No. 79-6740

In the Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT BULLINGTON,

Petitioner

—*v.*—

STATE OF MISSOURI,

Respondent

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSOURI

JOINT APPENDIX

RICHARD H. SINDEL
SINDEL, SINDEL & SINDEL
15A N. Meramec, Suite 200
Clayton, Missouri 63105
(314) 721-6040

Counsel for Petitioner

JAMES COOK
Assistant Prosecuting Attorney
7900 Carondelet
Clayton, Missouri 63105
(314) 889-2587

Counsel for Respondent

PETITION FOR CERTIORARI FILED JUNE 9, 1980.
CERTIORARI GRANTED OCTOBER 6, 1980.

INDEX

	Page
Docket Entries	1
Indictment	3
Information in Lieu of Indictment	7
Notice of Evidence in Aggravation	12
Motion to Quash Jury Panel	14
Amendment of the Information	17
Jury Instructions 10, 12, 14, 16—Guilt Phase	18
Verdict of Jury—Guilt Phase	21
Jury Instructions 30, 32, 33, 35, 36, 37, 38, 39—Penalty Phase	22
Verdict of Jury—Penalty Phase	27
Motion for Judgment of Acquittal or in the Alternative For a New Trial	28
Order Sustaining Defendant's Motion for New Trial	44
Prosecuting Attorney's Second Notice of Evidence in Aggravation	45
Motion to Strike Plaintiff's Notice of Evidence in Aggravation and to Exclude From Trial Evidence in Aggravation of Punishment	47
Petition for Writ of Mandamus	50
Stop Order	56
Order Denying Relator's Petition for Writ of Mandamus	58
Motion for Rehearing or in the Alternative to Transfer to the Supreme Court En Banc	59
State's Oral Argument Before the Supreme Court of Missouri	61
Portion of Petitioner's Argument Before the Supreme Court of Missouri	72

Page

State's Oral Argument—Rebuttal 74

Supreme Court of Missouri's Opinion 80

Order of the Supreme Court of the United States Granting Motion for Leave to Proceed in forma pauperis and Granting Petition for Writ of Certiorari.. 128

DOCKET ENTRIES

12-9-77 Indictment, Circuit Court, County of St. Louis

1-13-78 Information in Lieu of Indictment, Circuit Court, County of St. Louis

7-7-78 Notice of Evidence in Aggravation, Jackson County Circuit Court

7-8-78 Defendant's Motion to Quash Jury Panel

7-26-78 Amendment of the Information

10-2-78 Trial in Circuit Court, Jackson County commences

10-11-78 Trial Resumes. Some parties appear; same jury appears. Instructions 3 through 29, read to jury. Final argument by State and Deft. Jury to Jury Room with Instructions through 29, inclusive, and verdict forms at 2:45 P.M. to begin deliberations. Jury returns at 9:30 P.M. with the following verdicts: "As to Count I, we, the jury, find the defendant, Robert Bullington, guilty of Capital Murder, as in Instructions No. 10. /s/ T. William Lowry, Foreman."

10-12-78 Penalty portion of Trial begins. Same parties appear; same jury appears. State's evidence begins and concludes. Deft. adduces no evidence. Court reads Instructions 30, 31, and 32 to jury prior to introduction of evidence. After evidence Court reads Instructions 33 through 39, inclusive to jury. Argument made by State and Deft. Jury to jury room with instructions 30 through 39, inclusive at 3:00 P.M. to deliberate penalty. Jury returns at 3:50 P.M. with following verdict on Count I: "As to Count I, we, the jury, having found the deft. guilty of the capital murder of Pamela Sue Wright, fix the punishment at imprisonment for life by division of corr., without eligibility for probation or parole until the deft. has served a minimum of fifty years of his sentence. /s/ T. William Lowry, Foreman."

11-20-78 Defendant files Motion for Judgment of Acquittal or in the Alternative for a New Trial

2-13-79 Order: Deft.'s Motion for Judgment of Acquittal be overruled and deft.'s Motion for New Trial be sustained on the ground stated in paragraph 46 of the New Trial Motion. The cause is transferred to criminal Docket "A" for reassignment.

3-1-79 Asst. Prosecuting Attorney of Clayton, Missouri, files Notice of Evidence in Aggravation

3-14-79 Attorney for Defendant files Motion to Strike Plaintiff's Notice of Evidence in Aggravation and to Exclude from Trial Evidence in Aggravation of Punishment.

5-17-79 Petition for Writ of Mandamus (In The Alternative to a Petition for Writ of Prohibition), filed in Missouri Court of Appeals, Western District

5-17-79 Stop Order directed to the Hon. Donald L. Mason, Judge, Sixteenth Judicial Circuit, Jackson County, Missouri, Division 11, filed.

5-30-79 Relator's Petition for Writ of Mandamus and Alternative Petition for Writ of Prohibition denied, Stop Order entered 5-17-79 dissolved.

6-1-79 Motion for Rehearing or in the Alternative to Transfer to the Supreme Court En Banc filed.

STATE OF MISSOURI
IN THE CIRCUIT COURT
OF ST. LOUIS COUNTY

402723

STATE OF MISSOURI

vs.

ROBERT ERNEST BULLINGTON W/M/36
2821 Gatling
St. Louis, Mo., DEFENDANT

DOB: 8/16/41
Ht. 6'1" Wt. 165 lbs.
St. Louis County P.D.
77-42854

CHARGE: CT. I: CAPITAL MURDER
CT. II: KIDNAPPING
CT. III: ARMED CRIMINAL ACTION
CT. VI: BURG. 1ST DEGREE
CT. V&VI: FLOUR. DANGEROUS & DEADLY WEAPON

AFFIANT: Det. Chasteen

DATE WARRANT ISSUED: October 14, 1977
O&P 559.005
Rev. Mo. Stat. O&P 559.240
O&P 559.225 0-560.040
P-560.095 O&P 564.610
P.D.: St. Louis County

WITNESSES: (HOLD FOR GRAND JURY)

Ptn. Robert Manlon #1352
Det. Albert Chasteen #448
Det. Lester Reinhardt #568
St. Louis County P.D.

Mrs. Mary Jane Wright
John Perry Wright
136 Martigney
St. Louis County

Custodian of Records
Mo. Dept. of Revenue
Jefferson City, Mo.

INDICTMENT—Filed Dec. 9, 1977

STATE OF MISSOURI)
COUNTY OF ST. LOUIS) SS

COUNT I

The Grand Jurors for the State of Missouri, now here in Court, duly empaneled, sworn and charged to inquire within and for the body of the County of St. Louis, and State aforesaid, upon their oath present and charge that in the County of St. Louis and State of Missouri, on or about the 3rd day of September, 1977, the defendant did wilfully, unlawfully and feloniously knowingly, deliberately, premeditatedly and of his malice aforethought, make an assault upon one Pamela Sue Wright, the said ROBERT ERNEST BULLINGTON then and there unlawfully, wilfully, feloniously, knowingly, deliberately, premeditatedly and of his malice aforethought and with the intent to take the life of Pamela Sue Wright, did suffocate the body of Pamela Sue Wright thereby inflicting mortal injury from which Pamela Sue Wright did die on or about September 3, 1977;

COUNT II

The Grand Jurors for the State of Missouri, now here in Court, duly empaneled, sworn and charged to inquire within and for the body of the County of St. Louis, and State aforesaid, upon their oath present and charge that in the County of St. Louis and State of Missouri, on or

about the 3rd day of September, 1977, the defendant did wilfully, unlawfully, and feloniously, and without lawful authority, forcibly seize, confine and kidnap one Pamela Sue Wright with intent to cause said person to be secretly confined within the state against her will;

COUNT III

The Grand Jurors for the State of Missouri, now here in Court, duly empaneled, sworn and charged to inquire within and for the body of the County of St. Louis, and State aforesaid, upon their oath present and charge that in the County of St. Louis and State of Missouri, on or about the 3rd day of September, 1977, the defendant did wilfully, unlawfully and feloniously commit the crime, Kidnapping, a felony, under the laws of this State, with or through the use, assistance or aid of a dangerous and deadly weapon, to-wit: shotgun;

COUNT IV

The Grand Jurors for the State of Missouri, now here in Court, duly empaneled, sworn and charged to inquire within and for the body of the County of St. Louis, and State aforesaid, upon their oath present and charge that in the County of St. Louis and State of Missouri, on or about the 3rd day of September, 1977, the defendant did wilfully, unlawfully and feloniously and burglariously break and enter the dwelling house of Mrs. Mary Wright, hereinafter referred to as the victim, in which dwelling house there was at the time a human being, and that said ROBERT ERNEST BULLINGTON, did break and enter into said dwelling house by forcibly breaking or busing the outer basement door, of the said dwelling house with the intent to commit a felony, to-wit: Kidnapping;

COUNT V

The Grand Jurors for the State of Missouri, now here in Court, duly empaneled, sworn and charged to inquire

within and for the body of the County of St. Louis, and State aforesaid, upon their oath present and charge that in the County of St. Louis and State of Missouri, on or about the 3rd day of September, 1977, the defendant did wilfully, unlawfully and feloniously in the presence of one Mrs. Mary Wright, exhibit and flourish a certain dangerous and deadly weapon, to-wit: shotgun, in a rude, angry or threatening manner;

COUNT VI

The Grand Jurors for the State of Missouri, now here in Court, duly empaneled, sworn and charged to inquire within and for the body of the County of St. Louis, and State aforesaid, upon their oath present and charge that in the County of St. Louis and State of Missouri, on or about the 3rd day of September, 1977, the defendant did wilfully, unlawfully and feloniously, in the presence of one John Wright, exhibit and flourish a certain dangerous and deadly weapon, to-wit: shotgun, in a rude, angry or threatening manner; contrary to Missouri Revised Statutes in such case made and provided, against the peace and dignity, of the State.

A TRUE BILL

/s/ [Illegible]
Foreman

NO TRUE BILL

/s/ _____
Foreman

/s/ [Illegible]
Asst. Pros. Atty.

No. _____

September Term, 1977

Bail—NO BOND

/s/ Milton Saitz
Circuit Judge
St. Louis County

Cir.Ct.No. 402723

SUBSTITUTE INFORMATION IN LIEU OF INDICTMENT

STATE OF MISSOURI)
) ss.
COUNTY OF ST. LOUIS)

IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS STATE OF MISSOURI

STATE OF MISSOURI, PLAINTIFF

vs.

ROBERT ERNEST BULLINGTON, DEFENDANT

Charge:

I: Capital Murder (559.005)
II: Kidnapping (559.240)
III: Armed Criminal Action (559.225)
IV: Burglary First Degree (560.040/560.095
V & VI: Flourishing Dangerous & Deadly Weapons (564.610)
And Four Prior Convictions of Felonies

James J. Cook, Assistant Prosecuting Attorney, in and for the County of St. Louis, on behalf of the State of Missouri, upon official oath informs the Court as follows:

That ROBERT ERNEST BULLINGTON in the City of St. Louis, State of Missouri, on the 13th day of January, 1959, in the Circuit Court thereof, was duly convicted by said Court of the offense, Burglary Second Degree and Stealing, a felony, and in compliance with said conviction was duly sentenced to serve two (2) years in custody of the Missouri Department of Corrections for the Burglary and a consecutive term of three (3) years

for the Stealing a total sentence of five (5) years, and in compliance with said conviction and sentence was duly received at and imprisoned in said Department of Corrections on February 13, 1959;

And That, Thereafter, in the City of St. Louis, State of Missouri, on the 13th day of January, 1959, in the Circuit Court thereof, the said defendant was duly convicted by said Court of the offense, Robbery First Degree, a felony, and in compliance with said conviction was duly sentenced to serve five (5) years in custody of the Missouri Department of Corrections, and in compliance with said conviction and sentence was duly received at and imprisoned in said Department of Corrections on February 13, 1959;

And That, Thereafter, in the City of St. Louis, State of Missouri, on the 10th day of November, 1966, in the Circuit Court thereof, the said defendant was duly convicted by said Court of the offense, Stealing Fifty ($50.00) or over (Motor Vehicle), a felony, and in compliance with said conviction was duly sentenced to serve five (5) years in custody of the Missouri Department of Corrections, and in compliance with said conviction and sentence was duly received at and imprisoned in said Department of Corrections on December 9, 1966;

And That, Thereafter, in the City of St. Louis, State of Missouri, on the 17th day of February, 1971, in the Circuit Court thereof, the said defendant was duly convicted by said Court of the offense, Kidnapping While Armed, a felony, and in compliance with said conviction was duly sentenced to serve ten (10) years in custody of the Missouri Department of Corrections, and in compliance with said conviction and sentence was duly received at and imprisoned in said Department of Corrections;

COUNT I

James J. Cook, Assistant Prosecuting Attorney, in and for the County of St. Louis, on behalf of the State of Missouri, upon official oath informs the Court as follows:

That ROBERT ERNEST BULLINGTON in the County of St. Louis, State of Missouri, on or about the 3rd day of September, 1977, did willfuly, unlawfully and feloniously knowingly, deliberately, premeditatedly and of his malice aforethought, make an assault upon one Pamela Sue Wright, the said ROBERT ERNEST BULLINGTON then and there unlawfully, wilfully, feloniously, knowingly, deliberately, premeditatedly and of his malice aforethought and with the intent to take the life of Pamela Sue Wright, did suffocate the body of Pamela Sue Wright thereby inflicting mortal injury from which Pamela Sue Wright did die on or about September 3, 1977;

COUNT II

James J. Cook, Assistant Prosecuting Attorney, in and for the County of St. Louis, on behalf of the State of Missouri, upon official oath informs the Court as follows:

That ROBERT ERNEST BULLINGTON in the County of St. Louis, State of Missouri, on or about the 3rd day of September, 1977, did wilfully, unlawfully and feloniously, and without lawful authority, forcibly seize, confine and kidnap one Pamela Sue Wright with intent to cause said person to be secretly confined within the state against her will;

COUNT III

James J. Cook, Assistant Prosecuting Attorney, in and for the County of St. Louis, on behalf of the State of Missouri, upon official oath informs the Court as follows:

That ROBERT ERNEST BULLINGTON in the County of St. Louis, State of Missouri, on or about the 3rd day of September, 1977, did wilfully, unlawfully and feloniously commit the crime, Kidnapping, a felony under the laws of this State, with or through the use, assistance or aid of a dangerous and deadly weapon, to-wit: shotgun;

COUNT IV

James J. Cook, Assistant Prosecuting Attorney, in and for the County of St. Louis, on behalf of the State of Missouri, upon official oath informs the Court as follows:

That ROBERT ERNEST BULLINGTON in the County of St. Louis, State of Missouri, on or about the 3rd day of September, 1977, did wilfully, unlawfully and feloniously and burglariously break and enter the dwelling house of Mrs. Mary Wright, hereinafter referred to as the victim, in which dwelling house there was at the time a human being, and that said ROBERT ERNEST BULLINGTON, did break and enter into said dwelling house by forcibly breaking or bursting the outer basement door, of the said dwelling house with the intent to commit a felony, to-wit: Kidnapping;

COUNT V

James J. Cook Assistant Prosecuting Attorney, in and for the County of St. Louis, on behalf of the State of Missouri, upon official oath informs the Court as follows:

That ROBERT ERNEST BULLINGTON in the County of St. Louis, State of Missouri, on or about the 3rd day of September, 1977, did wilfully, unlawfully and feloniously in the presence of one Mrs. Mary Wright, exhibit and flourish a certain dangerous and deadly weapon, to-wit: shotgun, in a rude, angry or threatening manner;

COUNT VI

James J. Cook, Asssitant Prosecuting Attorney, in and for the County of St. Louis, on behalf of the State of Missouri, upon official oath informs the Court as follows:

That ROBERT ERNEST BULLINGTON in the County of St. Louis, State of Missouri, on or about the 3rd day of September, 1977, did wilfully, unlawfully and

feloniously, in the presence of one John Wright, exhibit and flourish a certain dangerous and deadly weapon, to-wit: shotgun, in a rude, angry or threatening manner;

cc: Joseph Downey
Asst Public Defender

314-889-2587

[SEAL]

OFFICE OF PROSECUTING ATTORNEY
St. Louis County
Courts Building
Clayton, Missouri 63105

July 7, 1978

COURTNEY GOODMAN JR.
Prosecuting Attorney

Mr. Richard Sindel
Attorney at Law
34 North Brentwood
St. Louis, MO 63105

RE: State of Missouri v.
ROBERT E. BULLINGTON
402723 (CR78-0768)

Dear Mr. Sindel:

Pursuant to R.S. MO. 565.006, please be informed that if a conviction of Capital Murder results from the trial of Mr. Robert Bullington, and the State of Missouri elects to seek the death penalty, the evidence of the following aggravating circumstances will be presented:

> "The offense was committed by a person with a prior record of conviction for capital murder, or the offense was committed by a person who has a substantial history of serious assaultive criminal convictions;" 565.012 2.(1)
>
> "The offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind;" 565.012 2(7)

More specifically the State would use as evidence the four prior convictions which are listed in the Substitute

Information in Lieu of Indictment. Also, the State would use as evidence the facts surrounding those convictions; particularly the convictions of Robbery First Degree and Kidnapping. I will provide for you a copy of the Kidnapping police report.

As to the other aggravating circumstances, the State would present to the jury the facts of the case. Of course the discovery process has already provided you with that information.

Very truly yours,

/s/ James J. Cook
JAMES J. COOK
Assistant Prosecuting Attorney

JJC:er
cc: Honorable Donald Mason
cc: Court file

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI

Criminal Docket A
Division No. 11
Circuit Court No. 78-0768

STATE OF MISSOURI, PLAINTIFF

—*vs*—

ROBERT H. BULLINGTON, DEFENDANT

MOTION TO QUASH JURY PANEL—
Filed July 8, 1978

Comes now the Defendant, Robert H. Bullington, by Richard H. Sindel, counsel, and moves the Court to quash any jury panel that may be produced as prospective jurors in this cause.

As grounds for this Motion, the Defendant alleges as follows:

1. Section 494.031, V.A.M.S., provides:

> The following persons shall upon their timely application to the court be excused from service as a juror either grand or petit. . . .
>
> (2) Any woman who requests exemption before being sworn as a juror;. . .

Article I, Section 22(b) of the Constitution of Missouri (1945) provides:

> No citizen shall be disqualified from jury service because of sex, but the court shall excuse any woman who requests exemption therefrom before being sworn as a juror.

The "Official Notice and Questionnaire" prescribed by Section 497.130, V.A.M.S. for distribution to prospective jurors, contains the following paragraph:

TO WOMEN:

The Constitution permits women to elect to serve or not to serve as jurywomen. Any woman who elects not to serve will fill out this paragraph and mail this questionnaire to the jury commissioner at once. It will not be necessary to answer the other questions.

.....
(Signature)

These provisions, which result in a disproportionately small number of women being available for jury service, deny the defendant his right to have a jury panel selected from a fair cross-section of the community as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975).

2. Section 497.130, V.A.M.S., also provides as follows:

1. The board of jury supervisors shall at least biannually compile a list of as many names as the board of jury supervisors designates in a written order made for the purpose by consulting any public records . . .

The list in no case shall contain less than twenty-five thousand names to be selected as nearly as may be equally from the several voting precincts in the county . . .

Defendant alleges that the lists of prospective jurors in Jackson County are not made up of names selected by "consulting any public records." Rather, prospective jurors are selected only from lists of registered voters, thereby drastically limiting the number of citizens that are potentially available for jury service. Therefore, jury panels are not selected in accordance with the state law.

WHEREFORE, the Defendant prays the Court to quash any jury panel produced and to declare Section 494.031, V.A.M.S., and Article I, Section 22(b) of the Constitution of Missouri in violation of the rights guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

Respectfully submitted,

/s/ Richard H. Sindel
RICHARD H. SINDEL
Counsel for Defendant
SINDEL, SINDEL & SINDEL
34 N. Brentwood, Ste. 14
Clayton, Missouri 63105
314/721-6040

[Certificate of Service Omitted in Printing]

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI

Case No. CR78-0768
Division No. 11
Criminal Docket "A"

STATE OF MISSOURI, PLAINTIFF

vs.

ROBERT ERNEST BULLINGTON, DEFENDANT

Ct. 1—Capital Murder
Ct. 2—Kidnapping
Ct. 3—Armed Criminal Action
Ct. 4—Flour. Dang. & Dead. Wpn.
Ct. 5—Flour. Dang. & Dead. Wpn.

MEMORANDUM

COMES NOW the State of Missouri by the Assistant Prosecuting Attorney, James J. Cook, and asks leave of court to amend the above styled cause to change the word "suffocate" in COUNT I to the word "drown".

JAMES J. COOK
Assistant Prosecuting Attorney

EXCERPTS FROM JURY INSTRUCTIONS

INSTRUCTION NO. 10

As to Count I, if you find and believe from the evidence beyond a reasonable doubt:

First, that between September 3, 1977 and September 11, 1977, in the County of St. Louis, State of Missouri, the defendant caused the death of Pamela Sue Wright by drowning her, and

Second, that the defendant intended to take the life of Pamela Sue Wright, and

Third, that the defendant knew that he was practically certain to cause the death of Pamela Sue Wright, and

Fourth, that the defendant considered taking the life of Pamela Sue Wright and reflected upon this matter coolly and fully before doing so,

then you will find the defendant guilty under Count I of capital murder.

However, if you do not find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty under Count I of that offense.

INSTRUCTION NO. 12

As to Count I, if you do not find the defendant guilty of capital murder, then you must consider whether he is guilty of murder in the first degree.

As to Count I, if you find and believe from the evidence beyond a reasonable doubt:

First, that between September 3, 1977 and September 11, 1977, in the County of St. Louis, State of

Missouri, the defendant caused the death of Pamela Sue Wright by drowning her, and

Second, that the defendant did so to prevent detection after kidnapping or to promote escape after kidnapping Pamela Sue Wright,

then you will find the defendant guilty under Count I of murder in the first degree.

However, if you do not find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty under Count I of that offense.

Kidnapping is defined as willfully and without lawful authority, forcibly to seize, confine, inveigle, decoy or kidnap any person, with intent to cause such person to be secretly confined against his will.

INSTRUCTION NO. 14

As to Count I, if you do not find the defendant guilty of capital murder or murder in the first degree, you must consider whether he is guilty of murder in the second degree.

As to Count I, if you find and believe from the evidence beyond a reasonable doubt:

First, that between September 3, 1977 and September 11, 1977, in the County of St. Louis, State of Missouri, the defendant caused the death of Pamela Sue Wright by drowning her, and

Second, that the defendant intended to take the life of Pamela Sue Wright, and

Third, that the defendant did not do so in anger or fear suddenly provoked by the unexpected acts or conduct of Pamela Sue Wright,

then you will find the defendant guilty under Count I of murder in the second degree.

However, if you do not find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty under Count I of that offense.

INSTRUCTION NO. 16

As to Count I, if you do not find the defendant guilty of capital murder or murder in the first degree or murder in the second degree, you must consider whether he is guilty of manslaughter.

As to Count I, if you find and believe from the evidence beyond a reasonable doubt that between September 3, 1977 and September 11, 1977, in the County of St. Louis, State of Missouri, the defendant caused the death of Pamela Sue Wright by drowning her, then you will find the defendant guilty under Count I of manslaughter.

However, if you do not find and believe from the evidence beyond a reasonable doubt each and all of the foregoing, then you must find the defendant not guilty under Count I of that offense.

STATE OF MISSOURI)
) SS
COUNTY OF JACKSON)

IN THE CIRCUIT COURT OF THE
COUNTY OF JACKSON
STATE OF MISSOURI

Cause No. CR78-0768
Division No. 11

STATE OF MISSOURI, PLAINTIFF

vs.

ROBERT E. BULLINGTON, DEFENDANT

VERDICT—Filed October 11, 1978

As to Count I, we, the jury, find the defendant, Robert E. Bullington, guilty of capital murder, as submitted in Instruction No. 10.

/s/ [Illegible]
Foreman

EXCERPTS FROM JURY INSTRUCTIONS

INSTRUCTION NO. 30

You have found the defendant guilty of capital murder. At this stage of the trial it will be your duty to determine within the limits prescribed by law the punishment which must be imposed for that offense.

The punishment prescribed by law for capital murder is either death or imprisonment for life by the Division of Corrections without eligibility for probation or parole until the prisoner has served a minimum of fifty years of his sentence.

INSTRUCTION NO. 32

It is your duty to follow the instructions and the law as the Court gives them to you. However, no statement, question, ruling or remark that I have made or may make during the entire trial is intended to indicate my opinion of what the facts are or what the punishment should be. That will be your responsibility. In performing that duty you alone must decide upon the believability of the witnesses and the weight and value of the evidence.

You will recall that the Court told you at the first stage of this trial that you must not assume as true any fact solely because included in or suggested by a question asked a witness. A question is not evidence, and may be considered only as it supplies meaning to an answer.

INSTRUCTION NO. 33

You will now hear argument by the prosecuting attorney and by counsel for the defendant regarding the punishment to be imposed. Their arguments are intended to

help you in understanding the evidence and applying the law, but they are not evidence.

You will bear in mind that it is your duty to be governed by the evidence as you remember it, the reasonable inferences which you believe should be drawn, and the law as given in instructions of the Court.

After counsel have argued the matter, the Court will give you further and final instructions concerning the law relating to the punishment. It is your duty and yours alone to decide upon the punishment to be imposed upon the defendant and to render such verdict under the law and the evidence.

The state's attorney must open the argument. Counsel for the defendant may then make his argument. No further argument is permitted by either side.

INSTRUCTION NO. 35

In determining the punishment to be assessed under Count I against the defendant for the murder of Pamela Sue Wright, you must first unanimously determine:

1. Whether the defendant has a substantial history of serious assaultive convictions.

2. Whether the murder of Pamela Sue Wright involved depravity of mind and that as a result thereof it was outrageously or wantonly vile or horrible or inhuman.

You are further instructed that the burden rests upon the state to prove beyond a reasonable doubt at least one of the foregoing circumstances, and that it is an aggravating circumstance. The defendant is not required to prove or disprove anything.

Therefore, if you do not unanimously find from the evidence beyond a reasonable doubt that at least one of the foregoing circumstances exists and that it is an aggravating circumstance, you must return a verdict fix-

ing the punishment of the defendant at imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence.

INSTRUCTION NO. 36

If you find and believe from the evidence beyond a reasonable doubt that one or more of the circumstances submitted in Instruction No. 35 exists and that at least one of them is an aggravating circumstance, it will then become your duty to decide whether a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death as punishment of defendant. In deciding that question you may consider all of the evidence relating to the murder of Pamela Sue Wright.

You may also consider any of the aggravating circumstances referred to in Instruction No. 35 which you found beyond a reasonable doubt.

If you do not unanimously find from the evidence beyond a reasonable doubt that a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death as defendant's punishment, you must return a verdict fixing his punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence.

INSTRUCTION NO. 37

If you decide that a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death, as submitted in Instruction No. 36, it will then become your duty to determine whether a sufficient miti-

gating circumstance or circumstances exist which outweigh such aggravating circumstance or circumstances so found to exist. In deciding that question you may consider all of the evidence relating to the murder of Pamela Sue Wright.

You may also consider:

1. Whether the defendant has no significant history of prior criminal activity.

2. Whether the murder of Pamela Sue Wright was committed while the defendant was under the influence of extreme mental or emotional disturbance.

You may also consider any circumstances which you find from the evidence in extenuation or mitigation of punishment.

If you unanimously decide that a sufficient mitigating circumstance or circumstances exist which outweigh the aggravating circumstance or circumstances found by you to exist, then you must return a verdict fixing defendant's punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence.

INSTRUCTION NO. 38

Even if you decide that a sufficient mitigating circumstance or circumstances do not exist which outweigh the aggravating circumstance or circumstances found to exist, you are not compelled fix death as the punishment. Whether that is to be your final decision rests with you.

INSTRUCTION NO. 39

You will be provided with forms of verdict for your convenience. You cannot return any verdict as the ver-

dict of the jury unless all twelve jurors concur in and agree to it, but it should be signed by your foreman alone.

If you decide, after considering all of the evidence and instructions of law given to you, that the defendant must be put to death for the murder of Pamela Sue Wright, your foreman must write into your verdict all of the aggravating circumstances submitted in Instruction No. 35 which you found beyond a reasonable doubt.

If, after considering all of the evidence and instructions of law, you decide that the defendant must be punished for the murder of Pamela Sue Wright by imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence, your foreman will sign the verdict form so fixing the punishment.

When you have concluded your deliberations you will complete the applicable form to which all twelve jurors agree and return it with all unused forms and the written instructions of the court.

If, after due deliberation, you are unable to agree upon the punishment, your foreman will sign the verdict form so stating. In such case, the court will fix the defendant's punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence. You will bear in mind, however, that under the law it is your primary duty and responsibility to fix the punishment.

VERDICT FORM—Filed October 12, 1978

As to Count I, we, the jury, having found the defendant guilty of the capital murder of Pamela Sue Wright, fix the punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole until the defendant has served a minimum of fifty years of his sentence.

/s/ [Illegible]
Foreman

IN THE CIRCUIT COURT OF THE
COUNTY OF JACKSON
STATE OF MISSOURI

Cause No.
Division No. 11

STATE OF MISSOURI, PLAINTIFF

vs.

ROBERT E. BULLINGTON, DEFENDANT

MOTION FOR JUDGMENT OF ACQUITTAL OR IN THE ALTERNATIVE FOR A NEW TRIAL

Filed November 20, 1978

COMES NOW the defendant, Robert E. Bullington, by and through his attorney, and moves the Court for a judgment of acquittal, or in the alternative for a new trial on the grounds that:

1. The Court erred in allowing venireman #9 Esto Jackson, #29 Richard W. Livingstone, #6 David Campbell, #18 Rebecca A. Borelli, #41 Edward F. Thompson, #59 Vincent R. Como, and other from the panel, to be stricken for cause by the prosecutor, said veniremen having given no indication that he could not follow the law the Court would give in the instructions. Said Veniremen were stricken only because they indicated they could not or would be very reluctant to impose the death penalty in subject cause. The allowance of these strikes for cause denied defendant his right to the presence on the panel of legally qualified veniremen, deprived him of his right to an impartial jury panel, deprived him of his rights to due process and equal projection of the law and a jury of his peers guaranteed under the V, VI and XIV Amendments to the U.S. Constitution and therefore denied him his right to a fair trial.

2. The Court erred in allowing the prosecuting attorney to propound questions to the veniremen about their relative abilities to impose the death penalty in subject cause for the reason that at the time of asking said questions the Prosecuting Attorney of St. Louis County knew that he would not actively seek or recommend to the jury that the death penalty be imposed and was rising said inquiry to deplete the panel and to strike those veniremen who would strongly indicate an adversion to the imposition of the death penalty. Said strikes unjustly deprived the defendant of his right to an impartial panel of legally qualified veniremen representing a true cross-section of the community and a jury of his peers. The allowance of said question and the subsequent improper strikes discussed in Point F, deprived defendant of his right to an impartial jury panel, his rights to due process and equal protection of the law, his rights to a jury of his peers, his rights as guaranteed to him by the V, VI and XIV Amendments to the U.S. Constitution, and, therefore, his right to a fair trial.

3. The trial Court erred in denying the defendant's pre-trial motion to dismiss Count I of the indictment for the reasons as set out more specifically in said Motion to Dismiss and for the reasons that Sections, 565.001, 565.003, 565.006, 565.008, and 565.016 RSMo. 1977 are unconstitutional in that they violate the Eighth and Fourteenth Amendments of the U.S. Constitution and Article IV, Section 21 of the Constitution of the State of Missouri.

4. The trial court erred in denying the defendant's pre-trial motion to sever counts because under 559.005, 559.240, 559.225, 560.040/560.095 and 564.610 V.A.M.S. the offenses alleged could not have been joined and Missouri Supreme Court Rule 24.04, which purports to allow joinder in the same indictment of offenses based on the same act or transactions or which constitutes part of a common scheme or plan, effects a change in the substenitive rights of the defendant by Supreme Court Rule,

an unconstitutional encroachment by the Judiciary Bench into the domain of the Legislative Branch under Article II, Section I of the Missouri Constitution.

5. The trial Court erred in denying the defendants pre-trial motion to sever counts because said refusal forced the jury into a situation wherein they could consider punishment of defendant on only one of six counts and allowed them unnecessary freedom to speculate as to why they were not allowed to assess punishment on Counts II-VI and would therefore deprive defendant of his right to a fair and impartial trial.

6. The trial court erred in denying the defendants pre-trial motion to sever Counts for the reason that there was no evidence supporting any argument that Count I was part of a common scheme or plan or that the offense charged in Count I was based on the same act or transaction as charged in the other Counts.

7. The trial court erred in denying the defendant's pre-trial motion to dismiss Count III of the Substitute Information In Lieu of Indictment for the reason that the charging of said offense, armed criminal action, in conjunction with the charges set out in Counts V and VI of the Substitute Information In Lieu of Indictment is specifically prohibited under Section 559.225 (4) V.A.M.S.

8. The trial court erred in denying the defendant's pre-trial motion to dismiss Count III of the Substitute Information in Lieu of Indictment because charging the defendant under both Count III and Counts V and VI amounts to placing the defendant twice in jeopardy in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 19 of the Missouri Constitution.

9. The trial court erred in denying the defendant's pre-trial motion to dismiss Count III of the Substitute Information in Lieu of Indictment, because Section 559.225 (1) V.A.M.S. provides for sentences specifically excluding parole, probation, conditioned release, or sus-

pended imposition or execution of sentence for a period of three years, which is an unconstitutional encroachment upon both the Executive and Judicial Branches of the State Government by the Legislative Branch under Article II, Section 1 of the Missouri Constitution.

10. The trial court erred by refusing to allow defense counsel to individually voir dire the members of the jury panel, as to hobbies or special interests, memberships in various organizations, publications they may subscribe to or read on a regular basis, newspapers they read or subscribe to on a regular basis, religious affiliation and the court further erred by admonishing defense counsel not to ask such questions in that:

A. The trial court's admonition reflected to the panel of veniremen a position of advocacy rather than objectivity.

B. Said questions were not objected to by the prosecuting attorney and no grounds were given for the Court's refusal to allow said questions.

C. By not affording defense counsel the opportunity to ask said questions the Court seriously hampered the defendant in making challenges for cause and intelligent and knowing peremptory challenges.

11. The trial court erred in denying the defendant's motion to suppress the in-court identification of defendant by Mary Wright and John Wright because such identification was fatally infected by the inherently suggestive out-of-court identification, conducive to mistake in that:

A. Before viewing the line-up Mary Wright and John Wright had seen the defendant's photograph on several occasions and on each occasion the viewing of the photograph directly related to the subject case and their identification.

B. Immediately before viewing the line-up Mary Wright and John Wright viewed the defendant on a local television news cast wherein it was indicated that the

defendant had that day been returned from California and that prior to viewing said line-up Mary Wright and John Wright were informed by Detective Chasteen and Seymour that a suspect had been brought in from California and would be in the line-up they were to view;

C. At the lineup which each of them observed defendant was the only one looking to be in his late 30's and the others appeared considerably younger or considerably older;

D. John Wright and Mary Wright were shown a photograph of the defendant the night before they were to testify in court by the Prosecuting attorney and they had since the line-up and prior to the trial seen numerous photographs of the defendant on newscasts and in the newspaper which by their coverage directly linked defendant to the crimes herein charged;

E. Both Mary Wright and John Wright testified they only saw the perpetrator for a period of 10-15 seconds and that his face was covered with make-up;

All in violation of the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution; and Article I, Sections 10, 15, and 18(a) of the Missouri Constitution.

12. The trial court erred in that the bailiffs and individuals who were responsible for the control summoning and accompaniment of the sequestered jury at all time when they were not in the court and present before the defendant, were not administered and did not take or swear to the oath in violation of Section 494.070 V.A.M.S.

13. The trial court erred in overruling the defendant's motion to suppress evidence and in allowing items seized from the residence and automobile of the defendant to be introduced against him, said items being seized as the result of an unlawful search, in violation of defendant's rights under Article I, Sections 10, 15 and 18(a) of the Misouri Constitution, and the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

14. The trial court erred for not dismissiong Count I of the Substitute Information in Lieu of Indictment for the reason that said statute constitutes an ex-post-facto law in that its validity depends on a future event (565.016 V.A.M.S.) in violation of the Constitution of the United States and the Constitution of the State of Missouri.

15. The trial court erred in not submitting to the jury M.A.I.-Cr2.50, the character instruction, for the reason that there was evidence of defendant's good character and said omission by the Court was in violation of Missouri Supreme Court Rule 26.02 (6).

16. The Court erred in admitting evidence of Defendant's flight from St. Louis, Missouri and the Killark Electrical Co. to Guyman, Oklahoma, and California in that at said time there was an active warrant pending for the arrest of the defendant on the charge of child molestation and, therefore;

Said flight could have resulted from the active warrant for defendant's arrest. Said testimony should not have been admitted into evidence because:

A. The defendant could not rebut the presumption that said flight resulted from a fear of being apprehended for subject cause as that would be evidence of other crimes.

B. It is ambiguous and mere speculation to presume or assume that the reason defendant fled was because of subject charge and not the active warrant for his arrest.

C. The admission of said evidence allowed the jury to speculate as to the reason for defendant's flight from St. Louis.

D. Said evidence was irrelevant, immaterial and because of its inherent ambiguity of a highly prejudicial nature while being of little probative value.

17. The trial court erred by telling the jury panel during the voir dire examination that they would sen-

tence the defendant for the reason that said comment was an improper statement of the law in that defendant was charged under the Habitual Criminal Act and the jury was not allowed to sentence the defendant on counts II-VI. This comment allowed and forced the jury to speculate as to why they were not allowed to sentence the defendant on Counts II-VI and in essence informed the jury that defendant had been convicted of other crimes.

18. The trial court erred by informing the jury panel that defendant's bond was set at $150,000 in that such a comment implied that defendant was a dangerous individual and a bond as high as that was required to insure his incarceration during the pendency of subject cause and allowed the jury panel to speculate as to the quality and quantity of the evidence before the Court which set the bond inferring that said evidence must be substantial and therefore required such a high bond causing the jury panel to be prejudiced against the Defendant and denying his right to a fair and impartial trial before an impartial jury.

19. The trial court erred in allowing the State to introduce into evidence State's Exhibit #91, a model 1200 Winchester Rifle, over defendant's objection for the reason that John Wright and Mary Wright could only testify that said exhibit was similar to the gun used by the suspect, there was no proper foundation laid for the admission of said Exhibit into evidence, and said admission was highly prejudicial to defendant in that Bernard Gonek later testifies that said Exhibit was identical to the weapon purchased by the defendant from Mr. Gronek.

20. The trial court erred in allowing Mary Wright to testify in direct examination that she had viewed other line-ups and photographic line-ups in which defendant or his photograph was not included for the reason that said testimony was irrelevant, immaterial and was an attempt by the prosecuting attorney to rehabilitate witnesses who had not been impeached.

21. The trial court erred in allowing John Wright to testify in direct examination that he had viewed other line-ups and photographic line-ups in which defendant or his photograph was not included for the reason that said testimony was irrelevant, immaterial and was an attempt by the prosecuting attorney to rehabilitate witnesses who had not been impeached.

22. The trial court erred in admitting into evidence over defendant's objections testimony from Mary Wright that when she heard the defendant speak at the line-up her knees buckled and she almost fainted for the reason that said testimony was irrelevant, immaterial and self-serving.

23. The trial court erred in admitting into evidence over defendant's objection testimony from Al Chasteen that Mary Wright fainted during the line-up defendant was in for the reason that said testimony was inadmissible as hearsay conduct and denied the defendant his right to confront and cross-examine witnesses guaranteed him under the United States Constitution.

24. The court erred in admitting into evidence over defendant's objection State's Exhibits 30, 31, 32, 33, 34, 35, 110, 111, and 112, 105, 108 and 116 which were picture's of the deceased's body at the scene of recovery and the morgue for the following reasons:

A. There was not a sufficient foundation laid for their admission in that there were not properly identified as to what they purported to represent, nor was there any testimony that they fairly and accurately depicted anything that existed at or near the time of the alleged killing. For this reason the pictures were irrelevant and immaterial and yet highly prejudicial to defendant, since clearly it was the intent of the prosecutor to allow the jury to speculate that they represented conditions at the time of the killing.

B. There was not a sufficient foundation laid for their admission in that they did not fairly and accurately reflect the recovery scene of the body in that the body had

been moved prior to the photographs having been taken. For this reason those photographs were irrelevant and immaterial and yet highly prejudicial to the defendant, since clearly the intent of the prosecutor was to allow the jury to speculate that they represented conditions at the time the body was first discovered.

C. The pictures were of such a gory and gruesome nature that they tended to inflame the passions of the jurors and therefore any probative value they had was far outweighed by their prejudicial effects toward defendant.

25. The trial court erred in admitting over defendant's objections testimony from Connie Matzek relating to certain statements allegedly made by the defendant to her for the reasons that:

A. At the time of said statements there was an active warrant pending charging the defendant with child molestation.

B. Said child molestation warrant charged defendant with having molested his own daughter.

C. Said statements were inherently ambiguous as to the subject matter they referred to and could have referred to the charge of child molestation.

D. That to explain said statements it would be necessary to introduce evidence of other crimes.

E. That the defendant specifically requested Al Chasteen to place him in isolation at the St. Louis County Jail Facility for other reasons that he feared for his life as a result of the publicity and nature of the child molestation charge.

F. That defendant was arrested in California and extradited from California for the charge of child molestation.

G. That said testimony was irrelevant, and immaterial and constituted hearsay and the only purpose of introducing same must have been to influence the jury to believe that the defendant's statement could only refer

to the crimes charged, but such belief would have had to be based on speculation and guesswork.

H. That said testimony was highly prejudicial to defendant but because of its ambiguous nature had no real probative value.

26. The court erred in overruling defendant's motion for judgment of acquittal on all six counts at the close of the state's case, because there was insufficient evidence to sustain a verdict of guilty.

27. The Court erred in overruling defendant's motion for judgment of acquittal on all six counts at the close of all the evidence because there was insufficient evidence to sustain a verdict of guilty.

28. The court erred in submitting Instruct #10 the state's verdict director on the charge of Capital Murder for the reasons that there was no evidence to support the giving of said instruction.

29. The Court erred in submitting Instruction #12, the state's verdict director on the charge of Murder First Degree for the reasons that there was no evidence to support the giving of said instruction.

30. The Court erred in submitting Instruction #14 the state's verdict director on the charge of Murder Second Degree for the reasons that there was no evidence to support the giving of said instruction.

31. The Court erred in submitting Instruction #16 the state's verdict director on the charge of Manslaughter for the reasons that there was no evidence to support the giving of said instruction.

32. The trial court erred by allowing the jury to take all the exhibits to the jury room for deliberations except States Exhibit #91 before they requested to do so for the reason that the jury does not have an absolute right to take said exhibits to the jury room and it would allow the jury the opportunity to conduct their own experiments and tests with the various exhibits all of which would lead the jury to guesswork and speculation as to matters outside the scope of the evidence. The defendant

was further prejudiced by such action in that he did not have an opportunity to review the juror's requests as the items were sought and to advise the court of his individual objections to the jury taking said exhibits for use in their deliveration.

33. The trial court erred in not sustaining comments from the prosecuting attorney during voir dire and during the course of the trial that he had reviewed the evidence and after having done so he ordered a warrant be issued for the reason that said statement would necessarily be leading to believe that there must exist some evidence known to the prosecuting attorney that definitely links the defendant to the crime charged and would allow the jury to speculate as prosecuting attorney's personal opinion as to the relative merit of the case, and the province of jury to be the decider of the facts was invaded through an impermissible inference of defendant's guilt.

34. The Court erred in admitting into evidence State's Exhibits 160, 171, 172, 164, 162, 173 and 174, hair samples taken from various individuals for the reason that the state laid no proper foundation to show an appropriate chain of custody.

35. The court erred in admitting into evidence over defendant's objections testimony from Joseph Bono that the hairs referred to in Point 34 did not match a hair seized from defendant's car for the following reasons:

A. The State did not lay a proper foundation to show an appropriate chain of custody for said hair.

B. There was no showing that said hair had not been tampered with.

C. The State did not establish that said hair was taken in such a manner to insure a proper sampling of the individual's hair. That said omissions rendered the experiments conducted on the hairs as mere speculation and guesswork and further that those hair samples taken were not done so in accordance with the best established procedure for obtaining samples for comparative

testing purposes. The admission of such comparison results could only lead the jury to speculate that the hair found and seized from the suspect's automobile belonged to the victim.

36. The trial court erred not allowing the defendant to speak to the jury for purposes of comparing his voice to the voice of Al Chasteen for the reason that there had been repeated testimony from Mary Jane Wright and John Wright concerning the comparison of the defendant's voice with that of Chasteen's and Mary Jane Wright had in fact identified the defendant by his voice alone. Said testimony would have been material and relevant and was offered for demonstrative purposes only. The court by refusing the defendant the opportunity for such a comparison unduly restricted the defendant from showing to the jury the distinct and substantial differences in the timbre and tone of his voice as compared to witness Chasteen's voice.

37. The jury's verdict was atainst the weight of the evidence.

38. The trial court erred in not instructing the jury on assault with intent to kill with malice, assault with intent to kill without malice, assault with intent to do Great Bodily Harm, and common assault as to the Count I thus for the reasons that said instructions were supported by the evidence and said refusal inalterably tainted the jury's verdict as to Count I because they were not properly instructed as to all of the possibilities in regard to a verdict of assault.

39. The trial court erred in submitting to the jury instruction no. 12 which constituted the court's explanation of the crime of felony-murder in the first degree on the grounds that such instruction incorrectly interpreted the laws of the State of Missouri as related to the facts of this specific case. The instruction hypothesized that the jury should find the defendant guilty if the defendant caused the death of Pamela Sue Wright in an effort to promote escape or to prevent detection after kidnapping Pamela Sue Wright. Such instruction was erroneous.

Specifically, there was no evidence that the drowning of Pamela Sue Wright occurred in an attempt by defendant to promote escape or to prevent detection and consequently Instruction No. 12 did not relate to the facts of this specific case.

40. The trial court erred in submitting Instruction No. 20 to the jury in that it was impermissibly vague and invited the jury to convict the defendant based on speculation and conjecture rather than legal principle. The instruction indicated that the jurors should convict the defendant if they found that he had committed the offense by the use of a dangerous and deadly weapon and did not explain to the jury what was meant by the phrase "by use of".

41. The Court erred in submitting Instruction #10, 12, 14, and 16, the state's verdict directions on Count I, for the following reasons:

a. There was no evidence to support the giving of said instruction.

b. The instructions varied from what the defendant was charged with in the substitute information in lieu of indictment, in that the defendant was charged with having caused the death of Pamela Sue Wright on September 3, 1977, whereas the instruction allowed the jury to find him guilty if they believed he caused the death of Pamela Sue Wright at any time between 9/3/77 and 9/11/77. Said variance denied defendant his right to due process of law by lessening the proof required for conviction without giving him the opportunity to defend against the lesser requirement. Said instruction further violated his rights to due process under the Fourteenth Amendment of the U.S. Constitution to notice of charges against him.

42. The trial court erred in allowing Angela Lotz to testify over defendant's objections concerning an incident involving a dark-haired man stopping and looking at Ms. Lotz and her friend, Terry Moore. Ms. Lotz was allowed to testify over defendant's objection that Ms.

Moore at one time lived in Pamela Sue Wright's house on 136 Martigney. Said statements were irrelevant and immaterial in that the prosecutor never linked the dark-haired man with the defendant nor was he ever able to establish with any evidence that the defendant knew or could have known where Ms. Lotz or Ms. Moore used to live on Martigney Drive. The only purpose of introducing said evidence must have been to influence the jury to believe that defendant must have been the dark-haired man and must have been searching for Angela Lotz on Martigney, but such belief would have had to be based on speculation and guesswork to defendant's prejudice.

44. The trial court erred in admitting into evidence over defendant's objection, state's Exhibit #143 a check purportedly signed by the defendant for the purchase of a shotgun and State's Exhibit #166 for the following reasons:

a. These exhibits were irrelevant and immaterial there being no showing sufficient to connect said exhibits to the defendant.

b. Their admission could only have been for the purpose of allowing the jury to speculate that there were in fact used, signed or in anyway connected with the defendant.

c. There was not a sufficient foundation laid for their admission.

d. Their admission and the court's subsequent release of these items to the jury allowed them to conduct their own experiments and comparisons of the signatures to determine authenticity whereas such conclusions are clearly only the subject of the admissible or carefully secreting by a highly trained expert.

45. The trial court erred by modifying MA1-CR2.70 and submitting it as Instruction #9 for the following reasons.

a. The modification of said instruction is not in accordance with any modification or alteration approved by the Supreme Court of Missouri.

b. The modification of said Instruction significantly altered the meaning and construction of said Instruction when read alone or in conjunction with the court's other instruction.

c. Said instruction as modified is not a proper statement of the law.

d. That the jury could interpret Instruction #9 to be a mandate to the jury that the defendant must be found guilty as to Instruction #20.

e. That said instruction is confusing and misleading as to how to apply Instruction #9 to the other verdict-director instructions.

f. That the instruction is a misstatement of the law in its face in that it directs the jury that they cannot find the defendant guilty or not guilty in Instruction #20, the verdict director for Armed Criminal Action;

All to the detriment and prejudice of the defendant.

45. The Court erred in submitting Instructions #10, 12, 14, 16, 18, 20, 22, 24, and 26, the verdict directors for the following reasons"

a. Not a proper statement of the law.

b. They were modified as to their form in a manner not suggested or approved by the Supreme Court of the State of Missouri.

c. Said modification was misleading as to each individual instruction and the instructions taken together as a whole in that a juror would, after reading said instruction, tend to believe that you could find the defendant guilty only, not guilty, or guilty of all the charges.

d. Said instructions were misleading in that they would tend to indicate to the jury if he were not guilty under the instruction he must then be guilty of another crime, charged or not.

e. That said instructions as modified tended to mislead and confuse the jury all to the detriment and prejudice of the defendant.

46. Prior to trial, the court erred in overruling defendant's motion to quash the jury panel insofar as the Jackson County procedure for the selection of petit jurors violates defendant's rights to a jury drawn from a reasonably representative cross section of society in violation of the Sixth and Fourteenth amendments to the United States Constitution. Said procedure in Jackson County allows women an automatic exemption which results in disproportionate underrepresentation of women on the jury panel: such a system is in violation of *Taylor* vs. *Louisiana*, 419 U.S. 522 (1975).

WHEREFORE, the defendant respectfully requests this Court to enter judgment of acquittal, or in the alternative to grant defendant a new trial.

Respectfully submitted,

/s/ Richard H. Sindel
RICHARD H. SINDEL
Attorney-at-Law
34 North Brentwood Blvd.
Suite 14
Clayton, Missouri 63105
(314) 721-6040

IN THE CIRCUIT COURT
OF JACKSON COUNTY, MISSOURI

No. CR78-0768
Docket L
Division 11

STATE OF MISSOURI, PLAINTIFF

vs.

ROBERT E. BULLINGTON, DEFENDANT

Ct. 1—Capital Murder
Ct. 2—Kidnapping
Ct. 3—Armed Criminal Action
Ct. 4—Burglary I
Ct. 5—Flourishing Dangerous & Deadly Weapon
Ct. 6—Flourishing Dangerous & Deadly Weapon

ORDER

APPEARANCES

1. State by Ass't. Pros. Atty. James Cook
2. Defendant in Person and by Atty. Richard Sindel

The ruling of the Supreme Court of the United States in *Duren* v. *State of Missouri*, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, and its progeny, being dispositive makes it unnecessary to rule on the more crucial and meritorious issues of whether the State made a submissible case of any degree of homicide, and the other issues raised in defendant's after-trial motions,

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that defendant's Motion for Judgment of Acquittal be overruled and defendant's Motion for a New Trial be sustained on the grounds stated in paragraph 46 of the new trial motion.

IT IS FURTHER ORDERED that the cause is transferred to Criminal Docket "A" for reassignment.

February 13, 1979
Date

/s/ [Illegible]
Judge

IN THE CIRCUIT COURT
OF JACKSON COUNTY, MISSOURI

No. CR78-0768
Division 11

STATE OF MISSOURI, PLAINTIFF

vs.

ROBERT E. BULLINGTON, DEFENDANT

Ct. 1—Capital Murder
Ct. 2—Kidnapping
Ct. 3—Armed Criminal Action
Ct. 4—Burglary I
Ct. 5—Flourishing Dangerous & Deadly Weapon
Ct. 6—Flourishing Dangerous & Deadly Weapon

NOTICE OF EVIDENCE IN AGGRAVATION

Pursuant to Section 565.006 (2) V.A.M.S., the State, by the below signed Assistant Prosecuting Attorney, hereby makes notice of its intention to seek the death penalty in the above styled cause and to present to the jury in any hearing upon the issue of punishment evidence of the following aggravating circumstances:

1. The offense was committed by a person who has a substantial history of serious assaultive criminal convictions.

2. The offense was outrageously or wantonly vile, horrible, or inhuman in that it involved torture or depravity of mind.

The State incorporates by reference all previously endorsed witnesses and reports presented to defense counsel in this cause. The testimony of these witnesses concerning the circumstances of the murder herein and the evi-

dence of prior convictions previously disclosed to defense counsel will be offered to prove the aggravating circumstances set out above.

Respectfully submitted,

/s/ James J. Cook
JAMES J. COOK
Assistant Prosecuting Attorney
7900 Carondelet
Clayton, Missouri 63105
314-889-2600

Certificate of Service (omitted in printing)

STATE OF MISSOURI)
) ss
COUNTY OF ST. LOUIS)

IN THE CIRCUIT COURT
OF THE COUNTY OF JACKSON, MISSOURI

Cause #CR78-0768
Division #11

STATE OF MISSOURI, PLAINTIFF

vs.

ROBERT E. BULLINGTON, DEFENDANT

MOTION TO STRIKE PLAINTIFF'S NOTICE OF EVIDENCE IN AGGRAVATION AND TO EXCLUDE FROM TRIAL EVIDENCE IN AGGRAVATION OF PUNISHMENT

COMES NOW defendant and for his motion states:

1. That on or about October 12, 1978 defendant was found guilty by a jury of a capital murder pursuant to Section 565.001 V.A.M.S.

2. That following the return of the guilty verdict by the jury, a hearing was conducted pursuant to Section 565.006 (2) V.A.M.S., to determine whether the required aggravating circumstances existed and whether the death penalty should be imposed pursuant to Section 565.008 V.A.M.S.

3. That after evidence was heard, the cause was submitted to the jury and they found that defendant, under the evidence, should be sentenced to life imprisonment, and that the requisite "aggravating circumstances" had not been proven beyond a reasonable doubt.

4. That on or about January 2, 1979, defendant filed a Motion For New Trial, which was granted on or about February 13, 1979, in light of *Duren* v. *Missouri*, No. 77-6067 (January 9, 1979).

5. That the plaintiff's Notice of Evidence in Aggravation, if not stricken, places defendant twice in Jeopardy in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States and Article 1, Section 19 of the Constitution of Missouri for the reasons that the determination of punishment has been made, and was not affected by the trial courts granting defendant's Motion For New Trial; that said determination of punishment constitutes a conviction of the offense of capital murder punishable by life imprisonment which is a lesser included offense of capital murder punishable by death; and that conviction of the offense of capital murder punishable by life imprisonment constitutes an acquittal of the offense of capital murder punishable by death.

6. That the plaintiff's Notice of Evidence in Aggravation and any presentment of said evidence is subject to the Doctrine of Collateral Estoppel in that the issue of punishment and aggravating circumstances considered in imposing said punishment has been previously litigated and imposed and remains undisturbed by the trial court's granting defendant's Motion For New Trial. Any admission of said evidence would lie in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States and Article 1, Section 19 of the Constitution of Missouri.

7. Defendant further states that the plaintiff's Notice of Evidence in Aggravation if permitted to stand and the presentment of said evidence at defendant's new trial would: Have a chilling effect on defendant's right to appeal in that a determination of punishment has been made; subject defendant to relitigation of this identical issue and therefore effectively hamper and chill his rights to seek that relief guaranteed him by law; deny defendant his right to effective assistance of counsel; deny defendant due process of law and equal protection of the law; subject defendant to cruel and unusual punishment, all in violation of the Fifth, Sixth, Eighth and Four-

teenth Amendments to the Constitution of the United States and Article 1, Sections 10, 18(a), 19, and 21 of the Constitution of Missouri.

8. The Prosecutor has not advised defendant or the Court by said Notice of Evidence in Aggravation of any evidence or grounds not available or presented at the first trial.

WHEREFORE, defendant prays that plaintiff's Notice of Evidence in Aggravation be stricken, and that all evidence in aggravation of punishment be excluded from trial.

Respectfully submitted,

/s/ Richard H. Sindel
RICHARD H. SINDEL
Attorney for Defendant
Sindel, Sindel & Sindel
34 N. Brentwood, Suite 14
Clayton, Missouri 63105
314/721-6040

Certificate of Service (omitted in printing)

IN THE CIRCUIT COURT
OF THE COUNTY OF JACKSON
STATE OF MISSOURI

No. ———

STATE OF MISSOURI, EX REL,
GEORGE R. WESTFALL, RELATOR

vs.

THE HONORABLE DONALD L. MASON,
Judge, Sixteenth Judicial Circuit
Jackson County, Missouri

DIVISION 11, RESPONDENT

PETITION FOR WRIT OF MANDAMUS

(In The Alternative To A Petition For
Writ of Prohibition)

COUNT I

(In Alternative To Count II)

Relator respectfully states:

1. George R. Westfall is the duly elected, qualified and acting Prosecuting Attorney for the County of St. Louis, State of Missouri.

2. Respondent herein is a Judge of the Sixteenth Judicial Circuit, Jackson County, Missouri, Division 11.

3. On the 9th day of December, 1977, an indictment was filed in the Circuit Court of St. Louis County charging the defendant Robert Bullington with Count I—Capital Murder, Count II—Kidnapping, Count III—Armed Criminal Action, Count IV—Burglary First Degree, Count V—Flourishing A Dangerous And Deadly Weapon and Count VI—Flourishing A Dangerous And Deadly Weapon.

4. On the 2nd day of May, 1978, a change of venue was granted and the case was transferred to the Sixteenth Judicial Circuit, Jackson County, Missouri.

5. On the 7th day of July, 1978, the State filed a Notice of Evidence in Aggravation, thereby indicating to the Court and the Defendant the State's intention to seek the death penalty if a conviction of Capital Murder resulted.

6. On the 2nd day of October, 1978, the trial in the case of State of Missouri v. Robert Bullington was convened in Division 11 of the Circuit Court of Jackson County and resulted in a verdict of guilty on all counts on the 11th day of October, 1978.

7. On the 12th day of October, 1978, the trial was held to consider punishment following the verdict of guilty of Capital Murder, and resulted in a finding by the jury that the defendant be sentenced to serve a term of imprisonment of life without probation or parole for at least 50 years.

8. On the 20th day of November, 1978, a motion for new trial was filed by the defendant.

9. On the 13th day of February, 1979, the Honorable Judge Donald L. Mason sustained the motion for new trial on the basis of the decision of the U.S. Supreme Court in the case of *State* v. *Duren*, U.S. Supreme Court No. 77-6067 (January 9, 1979).

10. Thereafter, the State filed a Notice of Evidence in Aggravation, thereby indicating to the Court and the defendant the State's intention to seek the death penalty upon the retrial of the case. (See attached Exhibit No. ——)

11. On the 12th day of March, 1979, the defendant filed a Motion to Strike Plaintiff's Notice of Evidence in Aggravation and to Exclude From Trial Evidence in Aggravation of Punishment. (See attached Exhibit No. ——)

12. On the 26th day of March, 1979, the parties appeared before the Honorable Donald L. Mason and argued defendant's motion to strike along with other motions.

13. On May 10, 1979 the Honorable Donald L. Mason announced his intention to enter an order on May 15, 1979 sustaining defendant's Motion to Strike the State's Notice of Evidence in Aggravation of Punishment, "to the extent that the State will not be permitted to seek the death penalty, should the defendant again be found guilty of Capital Murder." (See attached Exhibit No. ——)

14. On the 11th day of May, 1979, the Honorable Judge Donald L. Mason allowed the parties until May 18, 1979 to seek any extraordinary relief before he formally entered his ruling on the motion.

15. The order of Respondent denying the State the right to seek the death penalty in this case is an abuse of his discretion and would be beyond his jurisdiction in that:

A. Sections 565.001 and 565.008, R.S.Mo., as enacted in 1977 provides that the death penalty is one of the penalties available upon a conviction of Capital Murder.

B. According to previous case law, the possibility of a more severe sentence on retrial is no violation of defendant's protection against double jeopardy, does not offend the due process clause of the Fourteenth Amendment to the United States Constitution, does not place an impermissible chilling effect on the defendant's right to appeal or violate any other rights of the defendant.

16. Relator has no adequate remedy other than an extraordinary writ for the reason that there is no appeal or other remedy for the State to pursue under the Statutes of Missouri when a trial judge prohibits the State from seeking punishment which it is allowed by the statutes.

17. Relator states that time is of the essence in this matter and unless there is a prompt determination the trial will commence on June 4, 1979, with the State being unable to seek punishment allowed by the statutes.

WHEREFORE, Relator prays that this Honorable Court issue its Alternative Writ of Mandamum directed

to Respondent, a Judge of the Sixteenth Circuit, Division 11, Jackson County, Missouri, ordering him to permit the State of Missouri through the Relator, to ask for and seek the death penalty if there is a verdict of guilty of the charge of Capital Murder in the case of State of Missouri vs. Robert Bullington (Case No. CR78-0768), or, that Respondent appear to show cause, if he has any reason why he should not do so; that upon full final hearing this Court make said Writ peremptory, and for such other and further orders as shall seem just and proper.

COUNT II

PETITION FOR WRIT OF PROHIBITION

(In Alternative to Count I)

1. Relator recalls and incorporates by reference paragraphs 1-17 (including any attached Exhibits) of Count I of this petition.

2. The order which Respondent has indicated he will make concerning defendant's Motion to Strike Plaintiff's Notice of evidence in Aggravation and to Exclude From Trial Evidence in Aggravation of Punishment is an abuse of his discretion in that:

A. Sections 565.001 and 565.008, R.S.Mo., as enacted in 1977 provides that the death penalty is one of the penalties available upon a conviction of Capital Murder.

B. According to previous case law, the possibility of a more severe sentence on retrial is no violation of defendant's protection against double jeopardy, does not offend the due process clause of the Fourteenth Amendment to the United States Constitution, does not place an impermissible chilling effect on the defendant's right to appeal or violate any other rights of the defendant.

WHEREFORE, Relator prays this Honorable Court to issue its preliminary rule in prohibition directed to the Respondent, as the Judge of Division Eleven of the Six-

teenth Judicial Circuit, Jackson County, Missouri, prohibiting him from sustaining defendant's Motion to Strike Plaintiff's Notice of Evidence in Aggravation and to Exclude From Trial Evidence in Aggravation of Punishment, or that Respondent appear to show cause, if he has any, why he should not do so; that upon full final hearing this Court make said writ absolute; and for such other or further orders shall seem just and proper.

Respectfully submitted,

/s/ George R. Westfall
GEORGE R. WESTFALL
Prosecuting Attorney
St. Louis County, Missouri

By /s/ James J. Cook
JAMES J. COOK
Assistant Prosecuting Attorney

By /s/ John M. Walsh
JOHN M. WALSH
Assistant Prosecuting Attorney

STATE OF MISSOURI)
) SS
COUNTY OF ST. LOUIS)

George R. Westfall, being duly sworn upon his oath, states that he is the Prosecuting Attorney for St. Louis County, Relator herein, and the facts stated in the foregoing Petition are true to the best of his information, knowledge and belief.

/s/ George R. Westfall
GEORGE R. WESTFALL
Prosecuting Attorney

Subscribed and sworn to and before me, a Notary Public, in and for the County of St. Louis, State of Missouri, this 16th day of May, 1979.

/s/ Alice E. Griner
Notary Public

My Commission Expires: June 15, 1979

Certificate of Service (omitted in printing)

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

No. WD 30944

STATE OF MISSOURI, EX REL,
GEORGE R. WESTFALL, RELATOR

vs.

THE HONORABLE DONALD L. MASON,
Judge, Sixteenth Judicial Circuit
Jackson County, Missouri
Division 11, RESPONDENT

TO: THE HONORABLE DONALD L. MASON, Judge, Sixteenth Judicial Circuit, Jackson County, Missouri, Division 11:

STOP ORDER

WHEREAS, Relator, George R. Westfall, has filed herein his Petition for Writ of Mandamus in which he alleges that unless granted the relief prayed for therein you will exceed your jurisdiction with reference to proceedings in the matter pending before you styled "State of Missouri, Plaintiff, vs. Robert E. Bullington, Defendant," case No. CR78-0768 in your Court, and

WHEREAS, it appearing from the duly verified papers now on file in this Court that unless Relator is granted the relief prayed for therein you may exceed your jurisdiction in the premises,

IT IS THEREFORE ORDERED AND ADJUDGED that you take no further action in this case of any kind or character until further order of this Court, and that

you are hereby given until Thursday, May 24, 1979, to file Suggestions in Opposition to Relator's Petition for Writ of Mandamus herein.

Dated at Kansas City, Missouri this 17th day of May, 1979.

/s/ Ronald L. Somerville
RONALD L. SOMERVILLE
Presiding Judge—Writ Division

cc: Honorable Donald Mason
Richard Sindel
John Walsh

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

No. WD 30944

STATE OF MISSOURI, EX REL,
GEORGE R. WESTFALL, RELATOR

vs.

THE HONORABLE DONALD L. MASON,
Judge, Sixteenth Judicial Circuit
Jackson County, Missouri
Division 11, RESPONDENT

ORDER

The Court, being now fully advised in the premises,

Denies Relator's Petition for Writ of Mandamus and Alternative Petition for Writ of Prohibition in the above captioned cause, and,

Dissolves the Stop Order heretofore issued herein on May 17, 1979.

Dated at Kansas City, Missouri, this 30th day of May, 1979.

/s/ Ronald L. Somerville
RONALD L. SOMERVILLE
Presiding Judge—Writ Division

cc: Richard Sindel
John Walsh
Hon. Donald L. Mason

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI, EX REL,
GEORGE R. WESTFALL, RELATOR

vs.

THE HONORABLE DONALD L. MASON,
Judge, Sixteenth Judicial Circuit
Jackson County, Missouri
Division 11, RESPONDENT

MOTION FOR REHEARING
OR IN THE ALTERNATIVE
TO TRANSFER TO THE SUPREME COURT
EN BANC—June 1, 1979

Relator moves the Court for rehearing in the above cause, or in the alternative, to transfer said cause to the Supreme Court En Banc on the following grounds:

1. The Court in its opinion on May 30, 1979, inadvertently misinterpreted and overlooked the law and facts of this cause by holding that Relator cannot seek the death penalty herein for the reasons already mentioned to Court in Relators petition and suggestion, specifically the ruling of the United States Supreme Court that a higher sentence can be imposed upon retrial.

2. The Court by holding that the State cannot seek the death penalty has failed to follow, and its opinion and decision is in conflict with the controlling decisions of *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 93 S.Ct. 1977, 36 L.Ed.2d 714, and cases sighted therein, which have held that a more severe sentence can be sought and imposed upon retrial.

3. Relator respectfully moves the Court in the alternative to transfer this case to the Supreme Court of Missouri on the following grounds:

A. The question involved in this case is of such general interest and importance that the final decision thereof should be made by the Supreme Court of Missouri. In support thereof, Relator states:

1. The Capital Murder statute is relatively new to Missouri and the Supreme Court has not had the opportunity to determine the effect of the bifurcated trial system or the issue of seeking the death penalty upon retrial.

2. The construction of Missouri's Capital Murder statute will effect the populous, lawyers and courts throughout the state on a frequent basis.

B. The decision of this court is in conflict with *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 93 S.Ct. 1977, 36 L.Ed.2d 714, and *Stroud* v. *U.S.*, 251 U.S. 15, 40 S.Ct. 50, 64 L.Ed. 103, and *State* v. *Howell*, 543 S.W.2d 836 (Sp.App. 1970), and *State* v. *Johnson*, 485 S.W.2d 106, and the existing law concerning this point should be reexamined by the Supreme Court.

WHEREFORE, Relator respectfully requests the Court to grant him a rehearing in this case or to transfer the cause to the Supreme Court of Missouri.

Respectfully Submitted,

/s/ George R. Westfall
GEORGE R. WESTFALL
Prosecuting Attorney
St. Louis County, MO
by James J. Cook
Assistant Prosecuting Attorney
St. Louis County, Missouri

Certificate of Service (omitted in printing)

IN THE SUPREME COURT OF MISSOURI

STATE'S ORAL ARGUMENT

Mr. Cook: I am James Cook an Assistant Prosecutor from St. Louis County and in this particular case I represent George Westfall, the Prosecuting Attorney from St. Louis County. This is a Writ of Prohibition, Preliminary Writ issued by this Court on the question of whether or not the State can seek a death penalty upon a retrial of the defendant in this case.

For a little bit of background here in December of 1977, the State filed its indictment against the defendant charging him in 6 counts: Capital Murder, Kidnapping, Armed Criminal Action, Burglary in the 1st Degree and 2 counts of Flourishing a Dangerous and Deadly Weapon.

I might at this point mention that this was filed before the enactment of Rule 2404A.

Prior to trial the case was transferred from St. Louis County to Jackson County on a change of venue. The State filed with the Court and sent copies to the defendant of a Notice of Aggravating Circumstances indicating its intention to seek the death penalty upon the trial of this case.

At that time, in October of 1978, the case proceeded to trial in Jackson County, approximately a 10 day trial at the conclusion of which the defendant was found guilty of all counts. The next day the second stage of the trial was begun, the State introduced evidence as to the aggravating circumstance concerning substantial history of serious assaultive convictions and recalled to the jury the evidence of the case on its other aggravating circumstances being the wantonly vile nature of the offense. After argument by counsel the State, excuse me, the jury retired and returned with a decision that the defendant should be sentenced to life imprisonment without probation or parole for 50 years. But after the defendant filed his Motion for New Trial and the Court sustained

that Motion based on the decision of the Supreme Court of the United States in *State* v. *Duren*, which of course had to do with the jury selection process in Jackson County and a new trial was ordered.

Court: Is that Motion for New Trial in the record?

Mr. Cook: I do not believe it is in the record before this Court on this petition. I did not file it as an exhibit, I do not believe it was filed.

Court: So we don't know what he asked for in the Motion for New Trial, whether he asked for—I guess we don't because it is not in the record.

Mr. Cook: No sir, but a new trial was granted, the ruling of the Court was that the Court was forced to make that ruling based on a decision of *Duren* and a few cases that followed. *Duren* which indicated its retroactivity to a certain extent. The State mostly as a vehicle to get the issue decided again filed a Notice of Aggravation and these are the same aggravating circumstances that were filed at the first case. Defendant filed a . . . .

Court: Is it the same aggravating circumstances now that was filed in the first case?

Mr. Cook: Yes sir, they are.

Court: There are no changes in the aggravating circumstances?

Mr. Cook: No sir.

Court: Okay.

Mr. Cook: That notice I believe is exhibit 1 in the Petition before the Court. The defendant filed a Motion to Quash that Notice and in effect asked the Court to rule that the defendant could not be "in jeopardy of death again" and the trial judge indicated that he would sustain that order or that motion. The State sought a Writ of Prohibition from the Court of Appeals, Western District and it was denied and the State thereafter filed its Motion for Writ of Prohibition in this Court and the Preliminary Writ was issued. The State primarily rests its position that it is entitled to seek the death penalty in the second trial on the United States Supreme Court

decision of *Chaffin* v. *Stynchcombe*. It was a 1973 case. That case was decided after the *Pearce* v. *North Carolina* case. Now the *Pearce* case said that in a Judge-tried case, and a judge-sentencing, the judge on a retrial could not sentence to a harsher sentence the second time without meeting certain requirements including specifying why he was making a harsher sentence and pretty much requiring that the harsher sentence had to be based on actions of the defendant after the first trial. The *Stynchcombe* case refused to extend that reasoning to a jury sentencing situation. And said that in effect a defendant, upon getting a retrial, can be subject to a harsher sentence as long as it is within the range of punishment provided by statute that he received at the first trial. Both *Pearce* and *Stynchcombe* or the *Chaffin* case refer to the *Stroud* v. *United States* case, which is a 1919 decision of the U.S. Supreme Court where the Birdman of Alcatrez was found guilty the first time of murder and given a life sentence and at a subsequent trial was found guilty and given a death sentence. And the Supreme Court of the United States held that that was proper. In both the *Pearce* and the *Chaffin* cases the Supreme Court refused to overrule the *Stroud* case and so it seems to the State that reading both of these cases or all three of these cases together, there is no constitutional prohibition on seeking and receiving the death sentence in a retrial when the defendant has received life the first time.

Court: Do you have any case where there is a bifurcated trial situation such as we have here, where it was held that State could have another crack at the death penalty even though the aggravating circumstances that they were going to show at the second trial were the same as those in the first trial on which they lost?

Mr. Cook: The only case that we have been able to find, actually there are two cases, both out of Georgia, one is cited by defendant in his brief, *State* v. *Ward*, which is a Georgia Supreme Court decision. In that

Supreme Court case, or Georgia case, the Court seems to indicate that there is no constitutional prohibition against this, but bases its ruling on the statutes, in the statutes involved, and speaks to the disproportionateness of the decision, and I will get to that.

Court: Well, then that's the only case you know of that is presented, that's had this question presented?

Mr. Cook: I have recently found one other case out of Georgia, *Redd* v. *State*, in which the defendant—it's not really the same situation, the defendant received death in both first trial and second trial, but in that case the State added aggravating circumstances the second time and the-the Court had no problem with that. Those are the only two cases under the bifurcated system that I know of. Now, the Court in *Chaffin*, in a footnote speaks about the possibility of what a bifurcated system would do to their decision and without necessarily speaking of a death penalty situation, speaking just in general terms of bifurcated systems on sentencing, discusses the fact that they do not think that the bifurcation alone would remove . . . would change the *Chaffin* decision. In other words, the bifurcation alone would not put it back into a *Pearce* type situation.

Court: What bearing do you think would *Burkes* case, I think it is Burkes isn't it, that holds that if they don't have something new the second time around they can't try the defendant again? Isn't it *Burkes* v. *United States* . . . the double jeopardy case that was handed down fairly recently?

Mr. Cook: I'm afraid to say I'm not familiar with that case.

Court: That's the one that holds, I'm pretty sure, that if the State doesn't make a submissible case, they can't have a second crack at it or if they have lost on the issue, they can't have a second crack at it. What's the difference between in principle between that and the situation here where you have lost on the death penalty effort but now you want to do it again?

Mr. Cook: Right, the distinction I feel your Honor, is this. In the various cases, the *Redd* case in Georgia speaks of it, and the *Johnson* case out of . . . from this Court talks about what double jeopardy is and in both cases the distinction is made between double jeopardy, double jeopardy applies to convictions and not to punishment. The analogy that perhaps I would suggest to the Court is in the *Johnson* case from Missouri, this is a case that was decided in the early 70's but referred to a trial in the early 50's. And at that time the jury was required under the habitual criminal statute to decide whether or not prior convictions had been proven. In the first case . . . trial of Mr. Johnson, the State attempted to prove a couple of prior convictions, the jury was silent in their verdict as to whether or not they found that those prior convictions existed. The second trial—the State again presented to the jury evidence of those prior convictions and the defendant argued that that's double jeopardy. The jury having been silent on it the first time, has made the final determination of that and you can not again try him on that issue. The Supreme Court of Missouri in the *Johnson* case specifically mentions and if I may read very briefly and I think this is analogous. "The habitual criminal act goes only to the punishment not the guilt or innoncence of an accured of the offense on trial. The double jeopardy clause of the Fifth Amendment is written in terms of potential or risk of trial and conviction not punishment. The double jeopardy clause as we have noted is cast in terms of the risks or hazard of trial and conviction not of the ultimate legal consequences of the verdict. Given such meaning of the double jeopardy clause and the nature of the second offender act, the double jeopardy clause is not here applicable."

It is my suggestion that the habitual criminal statute as applied in the earlier 50's is analogous to the bifurcation system here. The jury determination of whether or not aggravating circumstances exist only goes to the legal consequence of the verdict.

Court: Then when you have the total judgment set aside because the jury was improperly constituted rather than for some trial error or some other thing that perhaps does not even (intelligible). Where it starts at the inception it vitiates the whole thing because the jury was improperly constituted—are you going to touch on that or does that make this case somewhat different than others?

Mr. Cook: I think it applies here. The decision is that the jury was improper, it was an improper jury. Now, I think that it is probably clear that if this jury, although it was paneled improperly, had actually acquitted the defendant of capital murder and found him guilty of murder 2nd, I think that double jeopardy would probably preclude us from going forward with capital murder even though the jury was improperly impaneled. But in this particular situation, I think where we are not really talking double jeopardy, I think that that is an important distinction to be made that the defendant can not have it both ways. I believe that that particularly the *Chaffin* case and to a certain extent the *Johnson* case out of Missouri touch on all of the major complaints that the defendant has as to why he should not be sentenced to death a second time. The double jeopardy situation I have already alluded to. The collateral estoppel issue—the jury was silent in this case as to whether or not it found that the aggravating circumstances existed. It is my position that the instructions as given to the jury, leave us not knowing whether the jury found the aggravating circumstances existed or did not. If the law was such that if the jury found aggravating circumstances existed they had to give the death penalty, then the fact that they came back with life would indicate that they did not find the aggravating circumstances existed. However, our statute and instructions allow them to find that the aggravating circumstances exist and write them down and get the death penalty and we can find that the aggravating circumstances exist but are out-

weighed by the mitigating circumstances, or they can find that the aggravating circumstances exist and are not outweighed by the mitigating circumstances but still they don't want to give the death penalty. In one of these last situations is the jury required to make an affirmative finding that they do or do not. So in effect we do not know what the jury ruled, we know that they didn't give death, but we don't know why. That's why I do not think that collateral estoppel is applicable because there has been in effect no final determination of that issue that we can really get our hands on.

Court: So you can't really argue that the jury didn't give him death because they found aggravating circumstances, can you?

Mr. Cook: I'm saying . . .

Court: That's what you are coming around to. Your argument would permit you to say well they didn't give him death but they did find aggravating circumstances.

Mr. Cook: I'm saying we don't know your Honor.

Court: Well we do know that they didn't give him the death penalty.

Mr. Cook: Right, which could be because they didn't find the aggravating circumstances exist or they did find the aggravating circumstances exist but they still didn't want to give him death.

The other issues brought forth by defendant include such things as vindictiveness and chilling effect which the *Chaffin* case surely talks of both of these, I would argue that the cases cited by the defendant, if you forgive me I'm going to use the terms defendant state and trial judge since in both cases, the relators change, it gets rather confusing The State will point out that the defendant's cases such as *Green* did not apply because there the first time he was convicted of murder 2nd and the second time he was convicted of murder 1st, that's clearly not the type of situation we have here. *Blackledge* was a misdemeanor that he was convicted on, then in a trial de novo the State filed a felony indictment. Those are

clear indications of vindictiveness. *Chaffin* seems to say that the fact that the jury does the sentencing and as long as the jury does not know what the first sentence was, this vindictiveness is taken care of, and also the state is not asking for any higher sentence than it did ask for in the first case. And *Chaffin* also talks about the chilling effect on the right to appeal. There are some cases of course that indicate that certain situations give rise to impermissible chilling effect on the right to appeal and *Chaffin* recognizes that but as in the *Jackson* case which was cited by the defendant, the *Chaffin* court specifically mentions that this *Jackson* case is a very narrow ruling and that all decisions that the defendant is required to make are going to be difficult decisions, and may in effect, have a chilling effect on his rights to appeal, but the question is-is it an impermissible chilling effect. And it seems to me that *Chaffin* read along with *Stroud* indicates that there is no impermissible chilling effect upon the right to appeal even in a death situation. The last point raised by defendant is the disproportionateness of this possibility of getting death a second time. The *Ward* case is the case out of Georgia where the defendant was sentenced to life imprisonment the first time around and given death a second time.

Court: Is that case in your brief?

Mr. Cook: It is in . . . in the other one.

In that case he was found guilty and given life the first time, death the second time and the Court by looking at the statute which says that the Court shall look at similar cases and similar types of situations and similar defendants shall determine whether or not this decision is disproportionate. I have three main reasons why I would ask this Court not to follow the Georgia ruling on this issue. One, I believe that this is an improper view of the intent of the statute. I think the intent of the statute was to look at several types of cases, for instance, if we have within the last several years, we have three or four capital murders which arose out of Quick

Shop, gas station, proprietor type of holdups, and in three cases the defendant is given life and in the last case was death, and the Court has to look at that and determine that this is disproportionate. I think also there is a certain racial issue here is attempted to be taken care of. The challenge is often been made that it is only blacks that get the death penalty. This takes care of that. We have three cases where the defendants were white and got life in a very similar situation where the defendant is black and got death. This Court can take care of that situation. Secondly, I would argue that it is premature at this point to rule that the death penalty in this case would automatically per se be disproportionate. One, this Court does not know what the evidence of the first case is, does not know what the evidence in the second case will be. Now the dissent in *Ward* makes a point of this. That the evidence in the second case is much stronger. I do not intend to tell this Court that the evidence in my case is going to be stronger. I anticipate that it will not, but I think that the Court would be setting a dangerous precedent if it now, even without looking at the evidence makes a per se ruling that it would in effect have to deal with in the future. In . . .

Court: What's the dangerous precedent that we would be setting?

Mr. Cook: I think if you automatically say that not for any constitutional reasons but for this disproportionate requirement in the statute, that everytime a defendant is given life the first time, he can not possibly be given death a second time, then I think there could come a situation. . .

Court: We are not quite required to say that here, because you have said to us, and I appreciate your candor, that your evidence is going to be the same this time.

Mr. Cook: Yes.

Court: So that we are really not forced to go as far as you say in this case.

Mr. Cook: No, but I think that if the Court would make this ruling at this time, in effect you'd be making a ruling without any knowledge of what the evidence was, whether it was a strong case to begin with or not a strong case to begin with the first or the second time. And you would be setting a precedent that might be difficult to deal with in later cases when you might want to look at the evidence and I think of course the Court could overrule it or change the precedent but I think it would be a precedent that you would be making without the benefit of the facts and the evidence in the case which I think you would want.

Thirdly, I thing it is faulty reasoning. The Court is required by the statute to look and see whether the death penalty in a particular case is disproportionate to similar cases and I stress the fact that is used the plural, "cases" is used. But you have two things, the first trial and the second trial, how can you say one is disproportionate to the other? You have two things, is one too large and the other one too small? I don't think that logically you can decide disproportionateness when you only have two things to compare and I think that the statute envisions this and says similar cases so that later you can say there are three cases that go this way, therefore, this case is disproportionate.

Court: What would we do with the very first case we get then?

Mr. Cook: I think that . . . I believe it is the *Gregg* case mentions that it was not unconstitutional for the Georgia court to consider capital death penalty cases which arose before the new statute was enacted so that means you can go back to other death penalty cases over the years. It is a difficult situation I realize but I think it can be overcome.

Also, brough out in the dissent in the *Ward* case is how do you determine what to do the next time when this type of situation arises? For instance, in this case, in the first trial we have a kidnapping and what the State is

describing as a brutal murder of a young woman by drowning her, the first jury gave the defendant life imprisonment. Let's assume that you allow us to go forward and the second jury gives death, but you at that time ruled that automatically that's disproportionate, therefore it is life. What happens two years later and you have a similar siuation and the jury gives death? Then in effect you've got two death juries and one life jury. And so it would seem that the life now is disproportionate. But because you have applied the per se rule, which I would submit is illogical, you then would be going the other way and saying the third case must be disproportionate. And as the dissent points out in *Ward* which case do you look at in later cases. Do you look at the first case that came back with life to compare a later case or . . .

Court: I worry about the comparison, that's going to be an important factor I would agree, but certainly the use of the case for a comparison basis is not near as important as the case itself when you are dealing with whether or not the death penalty should be imposed.

Mr. Cook: I would agree.

I think this a, what I think would be a side issue as to some of the consequences of what I think might occur if the Court would make this (intelligible). That's all I have. Any further questions? Thank you.

PORTION OF PETITIONER'S ARGUMENT

Mr. Sindel: I also believe that there is some merit to the point that we make that the two provisions under which the State wishes to proceed, that is that the defense was horrid, vile, wanton or that there is a substantial history of serious assaultive convictions runs into severe problems under the Fourteenth Amendment Due Process Clause for being vague and overbroad. For example, in the case at bar the evidence was that substantial history of serious assaultive convictions were two. Now perhaps if the legislature had said more than one, then we would know, but we have no determination and there is no guideline given to the jury as required in *Gregg* for what a substantial history is. Then we have to determine are these serious assaultive crimes, does serious modify crimes? And if that is the case, does it mean felonies, or does it mean that the assault itself is serious in that it involved perhaps bodily harm or serious threat.

Court: Pardon me, we have one minute left on your time.

Mr. Sindel: I don't believe . . .

Court: May I ask a little bit of that minute?

Mr. Sindel: Yes.

Court: I know that in *Duren* it was suggested that this court hadn't kept up with the law very well about taking the juries, but they have had capital murders particularly in Georgia and those places. Have you had any one particular case wherein there was a reversal, it couldn't have been perhaps for a Duren reason, but for any trial reason and went by and a decision was made the way you are going, to you have some of them cited here?

Mr. Sindel: The case we cited, the best case . . .

The Court: I mean since the bifurcated approach to life.

Mr. Sindel: It is the *Ward* v. *Georgia* case.

The Court: Ward v. Georgia.

Mr. Sindel: Now, in the particular case the State refers to the fact that the tribunal did not find that there was any violation of the constitution, that is not my interpretation, nor do I believe it is the correct interpretation of what the case says. My belief is that the case says we don't have to reach those determinations because we have decided that if it is the same trial, the death penalty is going to be substantial and disproportionate to a sentence in the second trial. That is the only case that I know that proceeded directly in point. On the point of whether or not that particular provision is vague or overbroad, there is cited in the *Gregg* case a Georgia case, *Arnold* v. *State*, 224 S.E.2d 386, which holds that the provision of substantial history of serious assaultive convictions is vague and overbroad. Thank you.

STATE'S REBUTTAL

Mr. Cook: I'll just take a few moments to answer a few of the things I might mention that the *Ward* case was originally reversed because of the error in alibi ruling (intelligible)

Court: Did you say, I couldn't hear, the *Ward* case?

Mr. Cook: Yes, it was an alibi problem in his first case.

Court: It may be that from the respect that the fact that this was set aside because of *Duren*, would be incorrect. If that thought were correct then if a person were convicted of a lesser included offense then the case were reversed because of jury conduct or misconduct or whatever, then in all those cases they could go back and try the fellow again for the higher offense. That would probably be in violation of a case or two wouldn't it?

Mr. Cook: I think it would. That's why I think it is important to make the distinction here that the second part of a bifurcated trial does not come under the double jeopardy.

Court: Let me ask you this, is this correct, you do not rely upon the fact that this case was reversed under *Duren* as of any significance?

Mr. Cook: I think it is an interesting side light, I don't rely upon it, It is an important aspect.

Court. Alright, thank you.

Court: If this matter hadn't appealed he'd be over in the penitentiary today, wouldn't he?

Mr. Cook: Yes.

Court: Despite that jury.

Mr. Cook: Yes.

First, I would like to ask the Court to find that what Mr. Sindel is asking the Court to find that that it is a legal fiction. There are not two statutes, there are not two offenses, there is one, Capital Murder. The question is how is that person to be punished. In the cases that

I cited, the *Johnson* case and several others, make a definite distinction. The aggravating circumstance in this situation I do not believe is an element of anything. It's given rather important significance in that they must find it beyond a reasonable doubt but it's not an element of . . .

Court: Is there any . . . Is there anything comparable in the State of Missouri that you can think of in the criminal law?

Mr. Cook: The only thing that I can think of was what I read earlier from the Johnson situation which used to be the case where the jury had to determine whether or not the habitual criminal statute applied.

Court: But then the punishment was automatic.

Mr. Cook: I believe so.

Court: It was the highest that could be charged?

Mr. Cook: Right, but . . .

Court: In the capital murder statute of Missouri, you say it really isn't two statutes, I don't know how—I'm not sure, I don't know whether they are subsections.

Mr. Cook: Sections.

Court: But if a person is convicted of capital murder, is this correct: He will be sentenced to life unless the jury, if it's before a jury, makes certain affirmative findings and concludes that he shall be sentenced to death.

Mr. Cook: That's correct.

Court: So that in order to get to the death penalty part, to that end result, it is not that it's necessarily based upon what was heard in the first part of the trial into considerate, but it does require affirmative findings.

Mr. Cook: Yes.

Court: Then how does that—then why is that not, why is that not comparable to, not a separate crime necessarily, but at least a sufficiently and significantly separate proceeding that it should be allowed to stand on its own feet.

Mr. Cook: I guess two reasons. One is the historic view of double jeopardy, that it is not both punishments. Now, the court can take that next step and say yes, capital murder is sufficiently different from capital murder situation, and the death penalty is sufficiently serious step we wish to apply it, but I think the Court would be going against the historic view.

Court: Well, I guess I'm kind of interested in is this, I don't have any quarrel with what you say with respect to the historic view, except that in the historic views are cases, where can we find one where the punishment . . . that strain of punishment or that aspect of the case required the State to proceed but on further evidence and then required a jury to make specific further findings, where can we find that in the history?

Mr. Cook: But I think, don't we have that to a certain extent in the old habitual criminal situation where they had to affirmatively find that required convictions existed before that next sentencing came into effect. Now clearly there are basic distinctions there. The other situation is this *Redd* v. *Georgia* case which is not cited in any of the briefs where the . . .

Court: R-e-d?

Mr. Cook: Right. R-e-d-d, 236 S.E.2d 365. The Supreme Court of Georgia.

Court: Will you do the same as . . .

Mr. Cook: Yes.

Court: The other gentlemen . . . give us a letter pretty quick.

Mr. Cook: I just gave you the cite to *Ward* so I apologize there. But the *Redd* case, as I mentioned earlier, the State . . .

Court: Are you saying Ward or Redd?

Mr. Cook: Now I am on Redd. R-e-d-d—Redd.

Court: Redd, I though (intelligible).

Mr. Cook: Excuse me. The *Redd* case, the first trial, the Court, the State gave three aggravating circumstances to the jury, and the jury stopped after finding

one of them and it was not clear, as it is not clear here, whether they found that the other two didn't exist or they just didn't go to them or whatever. The case was overturned for a reason I don't recall. The second time, the court, the jury was again given the three. Now, I think maybe even an extra one. Don't hold me to that. The Court had no problem with that. I think that if if the Supreme Court of Georgia, which apparently has had more opportunity over the years to decide these things, they have no problem with that holding that that is some sort of jeopardy, because clearly if the lack of finding an aggravating circumstance brings into effect double jeopardy, you could not bring that aggravating circumstance again in a later trial, and in effect they allowed that to happen in this particular case.

Court: But they gave him death in that one on the first time around.

Mr. Cook: Yes sir, both.

Court: May I ask this, doesn't this tell us that there is just one crime charged and that the second proceeding on the matter of determining the punishment is a part, a continuing part of the first and of the principle case, because the jury as I understand it, is charged with responsibility of considering all the things that they heard at the outset and all the qualities of the evilness of the crime or of the non-evilness of the crime. The heinousness or whatever so that that goes right on and is a (intelligible) and as I understood the thrust of the Supreme Court of the United States and its various cases where it has dealt with this problem of capital punishment, the irony is then we are going to extend an additional offering to the accused to give him a chance to, if you will, escape the death penalty and we are going to insist that there be a final evaluation of the of whether the death penalty should or shouldn't be awarded, after he has been found guilty of the crime of the capital murder and so it isn't if you will, seems to me a new concept of double jeopardy, but it's a matter of an additional benefit offered to the accused.

Mr. Cook: I agree. I think though that if the court would hold that this somehow is double jeopardy that that would be a new concept and of course would not be the result that I would ask for. Let me say that I think the Court, I don't know that the Court would want to, but this problem perhaps could be corrected if the instructions were made that you have to have a yes or no answer to each aggravating circumstance. Yes we find this aggravating circumstance to exist and we give death or no we do not find it and therefore we give life, or yes we find it. I think . . .

Court: I think that those aspects were probably already considered by the Court and under the statute, it's life unless there is affirmative findings of the aggravating circumstances plus a determination by the jury to impose death.

Mr. Cook: Right. I am not suggesting that the Court would want me to do this, I am suggesting that this would be one way to perhaps avoid the problem and I would not ask the Court to do it at all.

Two other points I would like to mention, briefly, I would I think I should deny on the record any indication of vindictiveness on the part of me or my office. I think that how we asked for and argued for the death penalty the first time and how we do it the second time is merely a matter of trial strategy and not to be considered in light of whether or not it is vindictive. Also the jury in the second trial should, I would assume, will not know how the State argued at the first trial.

Court: This question has been probably asked you, is there any difference in a reversal by a trial error for something or this *Duren* case where the State may itself kind of goofed up the deal by having a jury paneled there that was later disapproved by the Supreme Court of the United States. Is there any distinction at all, I mean, can we say here that I think Judge Higgins asked it, but there never has been a trial. That's kind of farfetched I presume, isn't it, to say that this man was

never in jeopardy in the first place because it was an illegally constituted jury and whatever they did was a total waste of time? Can we get by with that argument?

Mr. Cook: Well you can try. Laugh. I still have never forgiven Mr. Sindel for picking or convincing the trial Judge of St. Louis County to pick Jackson County of all of the counties in the State we could have gone, we picked the County with the Duren problem. But I don't think that, as I say, I think it is an interesting side light in one that may add light to how you would wish to rule. I would not think that you would be able to couch a ruling upon that, in that argument. Also on the vagueness of the statute I think again it is improper untimely for this Court to decide the constitutionality or the vagueness of the aggravating circumstances at this time since we do not have before you the evidence which I think would certainly add light to that and to a certain extent the Gregg decision by the Supreme Court has given at least tout approval to the wording in the aggravating circumstances. Thank you very much.

[SEAL]

SUPREME COURT OF MISSOURI

EN BANC

No. 61499

STATE EX REL. GEORGE R. WESTFALL, RELATOR

v.

HON. DONALD L. MASON, Judge, 16th Judicial Circuit, RESPONDENT

OPINION—Filed Feb. 11, 1980

I

Prohibition, to prevent respondent, the Honorable Donald L. Mason [1] Judge of the Sixteenth Judicial Circuit, from proceeding in the retrial of Robert Bullington for capital murder (the indictment charged numerous offenses) without allowing the prosecution to seek imposition of the death penalty.

Prior to trial in 1978 the State under § 565.006(2), RSMo 1978,[2] filed a "Notice of Evidence in Aggravation" announcing its intention to seek the death penalty in the capital murder charge. That trial resulted in a verdict of guilty on all counts including capital murder, October 11, 1978. A hearing was conducted the next day under the bifurated procedure mandated by § 565.006,

---

[1] Defendant was charged in the Circuit Court of St. Louis County by indictment with capital murder, kidnapping, armed criminal action, burglarly first degree and two counts of flourishing a deadly weapon. The cause was transferred on change of venue to the Sixteenth Judicial Circuit in Jackson County, Missouri.

[2] See also § 565.006, RSMo Supp. 1979 (as amended) (effective date September 28, 1979).

RSMo 1978, in which the jury was presented additional evidence in "extenuation, mitigation, and aggravation" of punishment. The jury directed that defendant be sentenced to life imprisonment without probation or parole for not less than fifty years.

Defendant's motion for new trial, challenging the constitutionality of the Jackson County jury panel, was sustained February 13, 1979, in light of the United States Supreme Court's holding in *Duren* v. *Missouri*, 439 U.S. 357 (1979). In preparation for Bullington's retrial the State has filed a second "Notice of Evidence in Aggravation" indicating its continued intention to seek the death penalty.[3] Responding, defendant moved to strike that "Notice" and to exclude from trial all evidence in aggravation of punishment. Respondent announced his intention to enter an order sustaining defendant's motion to strike, "to the extent that the state will not be permitted to seek the death penalty, should the defendant again be found guilty of capital murder." Relator then sought prohibition and for reasons now discussed, our preliminary rule heretofore entered is made absolute.

II

Respondent first contends prohibition is inappropriate procedurally because (1) relator (Prosecuting Attorney of St. Louis County) failed to allege the State had no adequate remedy at law, (2) that the state's limited right of appeal forecloses resort to prohibition, and (3) the issue does not involve the jurisdiction of the trial court. The first contention may be disposed of summarily. On October 2, 1979, by order of this Court relator was permitted to amend its petition and allege the State had no adequate remedy at law. As to respondent's second

---

[3] The notice advises the State will present evidence of two aggravating circumstances. First, that the killing was committed by a person with substantial history of serious assaultive convictions. § 565.012.2(1), RSMo 1978. Second, that the offense was outrageously or wantonly vile, horrible or inhuman. § 565.012.2(7), RSMo 1978.

argument it is precisely because the state has an extremely limited right of appeal under § 547.210 RSMo 1978, and Rule 28.04 (now Rule 30.02) that extraordinary relief is proper to review interlocutory orders in criminal cases. See *State ex rel. Corcoran* v. *Buder*, 428 S.W.2d 935, 939 (Mo. App. 1968). Further, it is settled law that, "The writ is properly invoked to restrain the enforcement of orders beyond or in excess of the authority of a judge and to keep a court within the compass of its jurisdiction." *State ex rel. Vogel* v. *Campbell*, 505 S.W.2d 54, 58 (Mo. banc 1974). Because, as we shall presently discuss, neither the federal nor state constitutions nor Missouri law prevent Bullington from being subject to the death penalty on retrial, the trial court exceeded (or by its announced order would have exceeded) its authority in denying the state leave to seek imposition of the death penalty. Accordingly, prohibition lies. See *State ex rel. Peach* v. *Bloom*, 576 S.W. 2d 744 (Mo. banc 1979).

III

The principal question for our determination is whether on retrial the death penalty under § 565.008, RSMo 1978 is barred as possible punishment by constitutional or statutory considerations. Respondent argues that because the jury in the first trial convicted Bullington of capital murder but sentenced him to life, the fifth amendment's prohibition against double jeopardy, the eighth amendment's proscription of cruel and unusual punishment, the fourteenth amendment's guarantee of due process and § 565.014.3(3), RSMo 1978, prevent the State from continuing to seek the death penalty. Long settled constitutional doctrine enunciated by this Court and reiterated in recent decisions of the United States Supreme Court leads to rejection of these challenges.

A defendant successfully overturning a conviction for a particular offense may in most instances be retried for

that *offense* notwithstanding double jeopardy doctrine.[4] *United States* v. *Ball*, 163 U.S. 662, 672 (1896); *Forman* v. *United States*, 361 U.S. 416, 425 (1960); *United States* v. *Ewell*, 383 U.S. 116, 121 (1966). In some cases the rationale for such results has been couched in language of a waiver theory and in others that retrial constitutes but continuing jeopardy. However the rule is more usually described in terms of policy considerations. As Mr. Justice Harlan explained in *United States* v. *Tateo*, 377 U.S. 463, 466 (1964),

> While different theories have been advanced to support the permissibility of retrial, of greater importance than the conceptual abstractions employed to explain the *Ball* principle are the implications of that principal for the sound administration of justice. Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interest.

Essentially respondent argues that the federal double jeopardy clause prohibits not the retrial for the *offense* of capital murder (Bullington *was convicted* of that *of-*

---

[4] For a limited exception to this rule see *Burks* v. *United States*, 437 U.S. 1, 18 (1978).

fense) but only the imposition of a more severe punishment upon retrial. Such contention was squarely rejected sixty years ago in *Stroud* v. *United States*, 251 U.S. 15 (1919). There defendant[5] was convicted in a second trial for the murder of a prison guard and sentenced to life imprisonment by the jury. On retrial (his third) secured by Stroud, the new jury also convicted him of first degree murder and he was sentenced to death. The Court held the fact that Stroud was subjected to the increased punishment of death upon retrial did not place him in double jeopardy. In *North Carolina* v. *Pearce*, 395 U.S. 711, 720 (1969), the Court reaffirmed that a necessary corollary of the power to retry a defendant is the state's power to impose any legally authorized sentence upon reconviction, though greater than the sentence originally imposed. In refusing to depart from an unbroken 75 year line of decision supporting this principle, the court explained, "[T]he original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean." *Id.* at 721. Recently the Court referred to Stroud as a "well-established part of our constitutional jurisprudence" and specifically declined an invitation to discard the principles stated there. *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 24 (1973). Within the past year the United States Court of Appeals for the Sixth Circuit, following *Stroud* and rejecting this same argument, held that the fifth amendment does not forbid imposition of the death penalty on retrial of defendant for an offense upon which he was originally sentenced to life. *Gully* v. *Kunzman*, 592 F.2d 283, 289 (6th Cir. 1979), *cert. denied*, 99 S. Ct. 2850 (1979).

Despite respondent's stated intention to circumvent the effect of *Stroud* and the decisions following it, we find nothing in the federal constitutional guarantee against double jeopardy to prevent the state from seeking the death penalty on Bullington's retrial for capital murder.

---

[5] Stroud was popularly known as the "Birdman of Alcatraz."

Respondent quite untenably suggests that the legislature has bisected the crime of capital murder defined in § 565.001, RSMo 1978.[6] He argues that if life imprisonment is the penalty imposed, the offense is somehow transfigured and changed into a *lesser included offense* of capital murder with capital punishment and becomes the crime of capital murder without capital punishment. Thus, he concludes, the jury's imposition of life imprisonment implicitly constitutes an acquittal of the greater offense. We are unwilling and indeed are unauthorized to indulge such fiction. It is not our prerogative to create separate crimes from those defined by statute. The simple fact is that capital murder under § 565.001, RSMo 1978 is a single crime with the range of punishment established by the legislature at life imprisonment without probation or parole for 50 years to the death penalty. Respondent's argument not only runs contrary to the decided cases, it ignores the statutory sections which define capital murder, prescribe the punishments for that offense, and detail the procedures for imposing those punishments. As noted above, there is but one crime defined as capital murder and the acts proscribed are specified in § 565.001. It was for that offense Bullington stood convicted following the first trial and it is for that offense he remains charged and awaits retrial.

As recognized by this Court in *State* v. *Duren*, 547 S.W.2d 476, 478-480 (Mo. banc 1977), federal constitutional requirements forbad mandatory imposition of capital punishment. In response to the constitutional directive that the jury's discretion in capital sentencing be "suitably directed" so as to minimize the risk of arbitrary and capricious application, *Gregg* v. *Georgia*, 428

---

[6] Section 565.001, RSMo 1978, provides: "Any person who unlawfully, willfully, knowingly, deliberately, and with premeditation kills or causes the killing of another human being is guilty of the offense of capital murder."

U.S. 153, 189 (1976), and that consideration of the individual circumstances of each offender and crime was "constitutionally indispensable," *Woodson* v. *North Carolina*, 428 U.S. 280, 304 (1976), the Missouri legislature enacted § 565.006 and § 565.012, RSMo 1978, providing for a presentence hearing following a conviction for capital murder at which time aggravating and mitigating circumstances as to the offender and the offense would be considered.[7] The existence of these sentencing procedures does not alter the fact that capital murder by statutory definition § 565.001, RSMo 1978, is a single offense, namely the unlawful, willful, knowing, deliberate and premeditated killing of another human being. The jury, in the § 565.006 proceeding, does not reconsider the issue of guilt, for that has been previously determined. Instead, at that stage they decide only the punishment to be imposed. In sum, the fact that the jury will consider *the range of punishment* for the offense of capital murder does not as respondent argues rend the crime of capital murder and create discrete offenses. The *Stroud* court dismissed such argument stating, "The fact that the jury

---

[7] The United States Supreme Court clarified the constitutional standards for imposition of the death penalty in five opinions announced in 1976. *Gregg* v. *Georgia*, 428 U.S. 153 (1976); *Jurek* v. *Texas*, 428 U.S. 262 (1976); *Proffitt* v. *Florida*, 428 U.S. 242 (1976); *Woodson* v. *North Carolina*, 428 U.S. 280 (1976); and *Roberts* v. *Louisiana*, 428 U.S. 325 (1976). In these opinions the court struck down as unconstitutional the North Carolina and Louisiana statutes providing for mandatory imposition of the death penalty and upheld the capital sentencing procedures enacted by Georgia, Texas and Florida. As explained in *Gregg*, "[T]he concerns expressed in *Furman* that the penalty of death should not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that insures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information." *Gregg* v. *Georgia*, 420 U.S. 153, 195 (1976).

may thus mitigate the punishment to life did not render the conviction less than one for first degree murder." *Stroud* v. *United States*, 251 U.S. 15, 18 (1919). See *Redd* v. *State*, 242 Ga. 876, 252 S.E.2d 383, 389 (Ga. 1979), *cert. denied*, 99 S. Ct. 2870.

Respondent also argues that the doctrine of collateral estoppel as embodied in the fifth amendment's protection against double jeopardy forecloses the state from seeking the death penalty if Bullington is again convicted of capital murder, and points to *Ashe* v. *Swenson*, 397 U.S. 436, 445 (1970). In *Ashe* the concept of collateral estoppel was elevated to the level of double jeopardy. There several poker players at their game table were robbed. Defendant was tried and acquitted for the crime of robbing player #1. An element necessary for conviction of that crime, (identity of the accused as the robber) was found against the State and defendant acquitted under his theory of alibi. In a later trial for the robbery of poker player #2 the Court deemed it double jeopardy to relitigate the identity issue. The *Ashe* Court stated that whether an issue of ultimate fact necessary for conviction is determined by a general jury verdict requires a court, "to examine the record of a prior proceeding, taking into account the pleadings, evidence, charge and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Ashe* v. *Swenson*, 397 U.S. at 444.

Respondent argues that a finding of no aggravation is necessary to the first jury's finding that defendant suffer life imprisonment rather than death for the crime of capital murder; hence the State is estopped from seeking to prove aggravation in the second trial. This contention is without merit for a number of reasons. A rational factfinder might well premise its imposition of life imprisonment on various factors other than the absence of aggravation. The applicable instructions drafted by the Supreme Court Committee on Patterned Criminal

Charges and Instructions for death penalty proceedings demonstrate this option in the jury. Under MAI-CR 15.42 if the jury finds that at least one of the statutory aggravating circumstances exists, it must decide whether it is a "sufficient aggravating circumstance" to warrant the imposition of the death penalty. Even then the jury need not impose death if in its weighing process it intuitively feels the mitigating circumstance(s) tips the scale against the death penalty. MAI-CR 15.44. Finally, though the jury finds that sufficient mitigating circumstance(s) have not been shown, defendant is given the further benefit of our Instruction MAI-CR 15.46 which provides: "[Y]ou are not compelled to fix death as the punishment. Whether that is to be your final decision rests with you." Thus the predilections of the jury as to mercy and the death penalty remain a part of the system within the limits and safeguards established by statute.

Clearly the first jury might have imposed life imprisonment in response to a defendant's plea for mercy rather than finding no aggravation. *Ashe* v. *Swenson* is inapposite here and the State is not precluded from seeking the death penalty by any aspect of the fifth amendment's protection against double jeopardy.

Respondent, relying on *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), next argues that allowing the prosecution to seek the death penalty, should Bullington be reconvicted of capital murder, would violate principles of due process in that a finding of capital punishment by the jury at retrial would be "tainted by vindictiveness." However, *Pearce* is not controlling here. In that case, defendant's conviction was reversed through collateral attack but on retrial he was again convicted and when resentenced by the court received more severe punishment than that originally imposed. *Id.* at 713-714. The *Pearce* Court concluded, "Due process of law, then, requires that *vindictiveness* against a defendant for having successfully attacked his first conviction must play

no part in the sentence he receives after a new trial . . . . [D]ue process also requires that a defendant be freed of apprehension of such a retalitory motivation on the part of the *sentencing judge*." *Id.* at 725. (Emphasis ours.) This exposure to possible vindictiveness of the sentencing judge does not occur in the jury sentencing process under Missouri's capital murder statutes.

The due process clause is not violated by all possibilities of increased punishment upon retrial, "but only by those that pose a realistic likelihood of vindictiveness." *Blackledge* v. *Perry*, 417 U.S. 21, 27 (1974). See *Colten* v. *Kentucky*, 407 U.S. 104, 116 (1972). *Ludwig* v. *Massachusetts*, 427 U.S. 618, 627 (1976). In this connection the Supreme Court held recently that Pearce-like restrictions were inapplicable in *jury resentencing* at least where improper and prejudicial information regarding the prior sentence is withheld. *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 28 (1973). The *Chaffin* court found the potential for vindictiveness in jury resentencing, de minimis for these reasons: First, a retrial jury in the normal course of events will be unaware of the disposition of the prior proceeding. Second, juries, unlike a trial judge, who has been reversed on appeal, will have no personal stake in the prior conviction and no motivation to engage in self-vindication on remand. Third, juries will not be sensitive to the institutional interests which might be promoted by imposing higher sentences after appeal as a means of discouraging meritless appeal. *Id.* at 26-27.

Respondent, in a final attempt to circumvent the clear import of *Chaffin*, suggests that because that case did not involve a bifurcated proceeding as provided under the Missouri capital murder statute, the holding there does not control our case. However, this overlooks the fact that *Chaffin* states:

> While some jury-sentencing States have adopted bifurcated jury trials, in which the jury assesses the punishment in a separate proceeding after a verdict

> of guilty has been rendered [citations omitted], bifurcation alone would not wipe away the fundamental differences between jury and judicial sentencing. It may make little sense to supply the jury with information about the defendant's conduct if the goal of jury sentencing is not necessarily to fit the punishment to the offender, and if the jury is, therefore, not concerned about matters considered pertinent to judicial sentencing.
>
> Petitioner and recent court of appeals cases suggest that an approximation of the *Pearce* limitations could be realized either by instructing the jury that it may return no verdict higher than the former sentence, or by empowering the judge to reduce the second sentence whenever it exceeds the former sentence. [citations omitted.] Although these alternatives would provide an absolute protection from the possibility of vindictiveness, they would also interfere with ordinary sentencing discretion in a manner more intrusive than contemplated by *Pearce*. They would achieve, in the name of due process, the substance of the result we have declined to approve under the Double Jeopardy Clause.
>
> *Id.* at 28 n.15.

Such constraints upon jury discretion as those urged by respondent would be particularly unfortunate in the capital sentencing area where individualized consideration of each offender is constitutionally required. *Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978).

Missouri decisions, prior to *Chaffin*, recognized that "vindictiveness" has no relevance to jury resentencing. See *Spidle* v. *State*, 446 S.W.2d 793, 795 (Mo. 1969). *Kansas City* v. *Henderson*, 468 S.W.2d 48, 52-53 (Mo. 1971), *cert. denied*, 404 U.S. 1004 (1971). Accordingly, we find that as a jury will decide whether Bullington should be subject to the death penalty if he is reconvicted of capital murder, there is no realistic likelihood

of vindictiveness on retrial. It is appropriate to reemphasize that defendant has been awarded a retrial which *he sought* and it does not violate due process to permit such trial for the crime he was originally and still stands charged. Nor does the award of a new trial alter the range of punishment prescribed by the statute. The decision as to punishment under the prescribed procedure is that of the individual jury, not to be engrafted upon or controlling of a new jury not yet empaneled. To hold otherwise would distort the clear purpose of the statutory scheme which offers protection against aberrant results by establishing a system that allows the trier of fact (1) to determine guilt or innocence without the distraction of evidence irrelevant to that issue (§ 565.006), (2) if a guilty verdict is returned to consider facts in aggravation and mitigation as they relate to punishment (§ 565.006(2)), and (3) provides a system of mandatory review (§ 565.014) that guards against, among other things, a sentence imposed "under the influence of passion, prejudice or any other arbitrary factor." (§ 565.014.3(1)). This is not a deprivation of due process, but an extension to a high order of the process due the accused. The subsequent jury will decide the issues anew and it is their responsibility to determine guilt and assess the punishment upon conviction (§ 565.006.2). Further, if on appeal reversal occurs "because of error only in the presentencing hearing, the new trial . . . shall apply only to the issue of punishment." § 565.006(3). There is no suggestion in this language that on such new trial the range of punishment is restricted to life imprisonment only. To the contrary, the choice of punishment is the principal issue to be decided in such a new trial.

Respondent next contends the possibility of a harsher sentence on retrial would unconstitutionally chill defendant's rights of appeal. We do not agree. *United States* v. *Jackson*, 390 U.S. 570 (1968), cited by respondent as authority, involved a federal anti-kidnapping statute

which allowed only the imposition of the death penalty following a jury trial. See 18 U.S.C. § 1201(a) (amended 1972). That statute was held to unconstitutionally deter the exercise of a defendant's fifth and sixth amendment rights to insist upon his innocence and demand a trial by jury. 390 U.S. at 581-583. Unlike the federal statute which singled for punishment by death that class of defendants who sought jury trials, the Missouri capital murder statutes draw no such invidious distinction.

Recent authority demonstrates that *Jackson* should be limited to statutes of the type which on their face penalize the assertion of constitutional rights. In *Brady* v. *United States*, 397 U.S. 742 (1970) and *North Carolina* v. *Alford*, 400 U.S. 25 (1970), defendants entered pleas of guilty to avoid the possibility of the imposition of capital punishment by a jury. The United States Supreme Court held that the fact a plea was entered to avoid the imposition of the death penalty by a jury did not *ipso facto* render the plea involuntary. *Brady* v. *United States*, 397 U.S. 742, 751 (1970; *North Carolina* v. *Alford*, 400 U.S. 25, 31 (1970). If the threat of the death penalty does not impermissibly coerce guilty pleas and encourage waiver of the plethora of rights guaranteed in a criminal trial under the fourth, fifth, sixth and fourteenth amendments, we do not believe the possibility of capital punishment unconstitutionally chills a defendant's right to appeal. This view is supported by that expressed in *Chaffin* v. *Stynchcombe*, *supra*, at 35 where it is stated: "The choice occasioned by the possibility of a harsher sentence, even in the case in which the choice may in fact be 'difficult,' does not place an impermissible burden on the right of a criminal defendant to appeal or attack collaterally his conviction."

Respondent next contends that § 565.008, RSMo 1978, is unconstitutional because the death penalty permitted therein constitutes cruel and unusual punishment violative of the eighth amendment of the United States constitution and art. I, § 21 of the Constitution of the State

of Missouri. This contention, first raised in defendant's Motion to Strike was renewed in respondent's brief before this Court with this language, "the death penalty, . . . is in all circumstances, a cruel and unusual punishment under both Federal and State constitutional provisions . . ." Respondent is quite mistaken, the death penalty is not per se violative of the eighth amendment. See *Gregg* v. *Georgia*, 428 U.S. 153, 187 (1976). Further, because the statutory procedures for imposition of the death penalty in Missouri are virtually identical to those contained in the Georgia statute challenged in *Gregg* no serious question remains as to their validity under the federal constitution. See *Gregg* v. *Georgia*, 428 U.S. 153, 196-207. *Lockett* v. *Ohio*, 438 U.S. 586, 604-605 (1978).

Thus we need examine only for the validity of § 565-.008, RSMo 1978, under art. I, § 21 of the Missouri Constitution.[8] The ultimate question is whether the punishment is disproportionate to the crime for which imposed. *State* v. *Agee*, 474 S.W.2d 817, 822 (Mo. 1971); *State* v. *Brownridge*, 353 S.W.2d 715, 718 (Mo. 1962). In this connection it has been held that a punishment is not cruel simply because it is severe. *Id. State* v. *Stubblefield*, 157 Mo. 360, 58 S.W. 337, 339 (Mo. 1900). When considering the constitutionality of a punishment statute enacted by our legislature, we presume its validity and those who seek to invalidate it bear a heavy burden of demonstrating that it is either barbarous or excessive. *Gregg* v. *Georgia*, *supra*, at 175 (1975); See *State* v. *Mitchell*, 563 S.W.2d 18, 26 (Mo. banc 1978).

We are mindful that the legislature necessarily considered those who have fallen victim to violent crime within our society. Their lives have been taken without notice and no rigorous procedural safeguards protected them from premeditated attack and death. No crime is more disruptive of peace and order or so violative of the

---

[8] Art. I, § 21, Mo. Const. provides: "That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

rights of the individual as murder. The spread of violent crime threatens the basic fabric of our Republic and surely all right thinking persons recognize that physical security of its members is among the first objects of an organized society. We cannot say that the death penalty is cruel and unusual punishment for those who unlawfully, willfully, knowingly, deliberately, and with premeditation kill another human being. This view finds wide support in the legislative enactments of sister states, as forty jurisdictions attach a penalty of death to certain categories of murder.

Given the extreme nature of the crime of murder, as well as the fact that the overwhelming majority of American jurisdictions allow imposition of capital punishment in specific instances, we will not substitute our judgment for that of our duly elected legislature in this question of policy. We hold § 565.008, RSMo 1978 does not prescribe cruel and unusual punishment in violation of art. I, § 21 of the Missouri Constitution.

It is next asserted that the death penalty may not be invoked at Bullington's second trial because § 565.008.2 (7), RSMo 1978, which provides one of the two aggravating circumstances the state seeks to prove at retrial, is unconstitutionally vague and overbroad in violation of the fourteenth amendment.[9] The United States Supreme Court, confronted by a similar argument in *Gregg* v. *Georgia*, 428 U.S. 153, 201 (1976), as to a Georgia statute (Ga. Code Ann. § 27-2534.1(b) (7)) with provisions essentially the same as ours, concluded that while it was arguable any murder involves "depravity," the language need not be construed in such a broad fashion. Hence this statutory aggravating circumstance was not found so wanting in precision that it rendered the capital sentencing procedure capable of arbitrary and capricious

---

[9] Section 565.008.2(7) provides: "The offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind."

decision violative of the eighth amendment. We see no reason to find that our almost identical statutory provision violates the fourteenth amendment particularly when the statute and its application is subject to mandatory review by the Missouri Supreme Court in all capital cases.

Respondent's final claim is that § 565.014.3(3), RSMo 1978, forbids the prosecution from seeking the death penalty at Bullington's second trial. That statute mandates proportionality review by this Court and that we determine in each case the excessiveness vel non of the death penalty's imposition.[10] We reject the contention that when a jury in the first trial of a capital murder case imposes a life sentence, assessment of capital punishment by any subsequent jury is invariably excessive. Such argument is little more than a variant of the double jeopardy argument dealt with earlier in this opinion, but respondent, pressing the contention, relies in the main on *Ward* v. *State*, 239 Ga. 205, 236 S.E.2d 365 (Ga. 1977). *Ward* is distinguishable from the case at bar in that the evidence had been presented at the subsequent proceeding and that evidence "was essentially the same" as that presented at the first trial where the jury did not recommend a sentence of death. *Id.* at 366. No evidence has been adduced in the pending retrial of this cause and we will not indulge the speculation urged as to the State's or defendant's evidence at a future trial, this notwithstanding the argument that the "notice" contains the same general averments as the earlier "notice" and despite relator's statements in oral argument that the state in-

---

[10] Section 565.014.3 provides that in the review of all cases in which capital punishment is imposed this Court shall determine: ". . . (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstances as enumerated in section 565.012, and (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

tended to present the same evidence at Bullington's retrial. The evidence finally adduced depends upon the witnesses not relator's expressed intention. Any rule or decisional pronouncement foreclosing on retrial additional proof in *mitigation or aggravation* within the scope of the notice, is quite unacceptable and we decline respondent's invitation to invoke such a rule as to a single phase of the proof, i.e., *aggravation.* More importantly we decline to follow the Georgia court in the construction of Missouri's death penalty statutes. *Ward* held that once a jury in a capital case finds life imprisonment, a jury sentence of death in any subsequent trial "is obviously disproportionate." *Id.* at 368. We are not persuaded to this point of view for a number of reasons. As noted above, not only may the proof vary in the second proceeding, but the jury which deemed a life sentence appropriate may well have been aberrant. It cannot be said that the findings of the first improper jury sound with finality as to aggravation or mitigation as our instructions explicitly allow the juror's individual values to be considered in the capital sentencing process. See MAI-CR 15.46. Also we have no record of the evidence from the first presentence hearing and cannot say what error may have occurred other than the fact the jury selection process in Jackson County was constitutionally infirm. Further, if such record were before us the fact remains it would be impossible to predetermine the evidence emerging in the new trial and we consider it improper to predecide the result that should flow from the proof. Finally, if defendant's (respondent's) argument were accepted that the first jury's decision on punishment binds any later jury, the argument could be made that if the first jury decided on death as an appropriate sentence

the second jury's consideration would be limited to only that punishment. Needless to say defendant would promptly abjure that result.

The rule is made absolute.

ALBERT L. RENDLEN
Judge

Morgan and Higgins, JJ., concur;
Donnelly, J., concurs in separate concurring opinion filed; Welliver, J., concurs in result; Bardgett, C.J., dissents in separate dissenting opinion filed; Seiler, J., dissents in separate dissenting opinion filed.

[SEAL]

SUPREME COURT OF MISSOURI

EN BANC

No. 61499

STATE EX REL. GEORGE R. WESTFALL, RELATOR

vs.

HONORABLE DONALD L. MASON, Judge,
16th Judicial Circuit, RESPONDENT

CONCURRING OPINION—Filed Feb. 11, 1980

I would make a few observations on the issue of *double jeopardy.*

My Brother Seiler would, for constitutional purposes, and in a situation calling for a bifurcated proceeding, relate the prohibition against double jeopardy not only to the *offense* of capital murder of which Bullington was convicted but also to the *punishment* imposed for the offense of which he was convicted. He would reason that Bullington can be retried for the *offense* of which he was originally convicted because he *waived* the double jeopardy protection by attacking the validity of his conviction on *Duren* grounds—but Bullington cannot be subjected to a *punishment* greater than that assessed at his first trial because there was an implied acquittal of punishment by death.

In order to embrace such a position, capital murder must be treated as two offenses (capital murder where death may be imposed and capital murder where imprisonment for at least fifty years may be imposed) *or* it must be assumed that there are two "degrees" of capital murder (one sufficient to impose death and one not).

In my view, the discretion given by statute to assess punishment at less than death does not support either

proposition. I find nothing in either constitution which would require that we construe capital murder as constituting two offenses or as being divided into degrees. The jury finding in October 1978 that Bullington should be sentenced to life imprisonment without probation or parole for not less than fifty years was not a determination that any element of the offense of capital murder is lacking. The constraints of double jeopardy are not involved here.

I would also make a few observations about imposition of the *death penalty* under § 565.008, RSMo 1978.

Article I, § 21 of the Constitution of Missouri provides that "excessive bail shall not be required, nor excessive fines imposed, nor *cruel and unusual punishment inflicted.*" (Emphasis supplied.)

In my view, the taking of a life for a life is not always cruel. History teaches us that it is not unusual.

The taking of the life of a human being *by another human being* "unlawfully, willfully, knowingly, deliberately, and with premeditation" (§ 565.001, RSMo 1978) cannot be tolerated by organized society. Our Constitution promises that the "natural right to life" of all persons will be protected. Mo. Const. art. I, § 2.

The ultimate question is: May that protection be effected by the imposition of capital punishment? The arguments which swirl about us as to the validity of suggested justifications for the imposition of death as punishment (e.g., retribution and deterrence) make for fascinating reading but miss the mark. *See* S. Donnelly, *A Theory of Justice, Judicial Methodology, and the Constitutionality of Capital Punishment: Rawls, Dworkin, and a Theory of Criminal Responsibility*, 29 Syracuse L. Rev. 1109 (1978); and R. Gardner, *Capital Punishment: The Philosophers and the Court*, 29 Syracuse L. Rev. 1175 (1978).

However, it is my personal belief that an organized society that takes a life for a life as a part of its public policy is mistaken in its belief that it is promoting its

own basic premise "that all government * * * is instituted solely for the good of the whole." Mo. Const. art. I, § 1.

Although I am compelled to concur, it is my view that taking the life a human being "willfully, knowingly, deliberately, and with premeditation" (albeit "lawfully") *by an organized society* is socially amoral. I think it will be self-destructive and that inevitably it will lower the quality of society and will be detrimental, if not devastating, to "the good of the whole." In warfare a fragile line sometimes exists between amoral killing and killing regarded as moral by world society. Here I think the line is not fragile but plain. Establishment of a studied public policy by which a whole community intentionally crosses the line into what I view as amoral killing, even though legal, represents a risk too great to itself for that community to assume.

In my view, banishment for fifty years (§ 565.008, RSMo 1978), with no concern for the probable fiction of rehabilitation, is an acceptable alternative. It would effectually excise the transgressor from our society without debilitating our society's collective concept of decency.

However, I have no authority to impose such views on the people of Missouri. To borrow from Mr. Justice Frankfurter: "As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard." West Virginia State Board of Education v. Barnette, 319 U.S. 624, 647 (1943) (Frankfurter, J., dissenting).

I have spoken of the death penalty in terms of *public policy*. It should be noted that constitutional concerns must be addressed by this Court, under authority of § 565.014, RSMo 1978, in each case where death is imposed as punishment.

I concur.

ROBERT T. DONNELLY
Judge

[SEAL]

SUPREME COURT OF MISSOURI

EN BANC

No. 61499

STATE EX REL. GEORGE R. WESTFALL, RELATOR

vs.

HONORABLE DONALD L. MASON,
Judge, 16th Judicial Circuit, RESPONDENT

DISSENTING OPINION—Filed Feb. 11, 1980

I dissent and concur in the dissenting opinion of Seiler, J. However, I wish to address the nature of our new capital-murder statute because I believe it differs in a substantive way from former murder statutes which permitted the death penalty as one of the punishments and thereby calls for different treatment by this Court.

Capital murder is not treated as two offenses. Nor do I think the dissent of Seiler, J., suggests that it is two offenses.

The old first-degree-murder statute, § 559.010, RSMo 1969, repealed Laws of Mo. 1975, p. 408, § A (hereinafter "old capital murder law") provided:

> 559.010. Murder in the first degree
>
> Every murder which shall be committed by means of poison, or by lying in wait, or by *any* other *kind of willful, deliberate and premeditated killing*, and every homicide which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or mayhem, *shall be deemed murder in the first degree.* (Emphasis added.)

The punishment was to be arrived at and assessed in accordance with § 559.030, RSMo 1969, repealed Laws of Mo. 1975, p. 408, § A, which provided:

> 559.030. Trials for murder, verdict and punishment
>
> Upon the trial of an indictment for murder in the first degree, the jury must inquire, and by their verdict ascertain, under the instructions of the court, whether the defendant be guilty of murder in the first or second degree; and *persons convicted of murder in the first degree shall suffer death, or be punished by imprisonment in the penitentiary during their natural lives*; those convicted of murder in the second degree shall be punished by imprisonment in the penitentiary not less than ten years. (Emphasis added.)

The new capital-murder statute essentially copied the mental elements of the old capital-murder law, italicized supra, and designated the offense "capital murder" as follows:

> 565.001. Capital murder defined.—Any person who unlawfully, willfully, knowingly, deliberately, and with premeditation kills or causes the killing of another human being is guilty of the offense of capital murder. (L. 1977 H.B. 90 § 1) Effective 5-26-77 [1]

Elaborate procedures now appear in our laws whenever the death penalty is a possible punishment. §§ 565.006, 565.008, 565.012, 565.014, 565.016, RSMo 1978. The penalty section itself is § 565.008.1, RSMo 1978, and provides:

> 565.008. Death penalty, when imposed—life imprisonment, when imposed—minimum of fifty years

---

[1] That part of repealed § 559.010, referring to homicides committed in the course of certain felonies "felony murder", became first-degree murder, § 565.003, RSMo 1978, punishable by life imprisonment, § 565.008.2, RSMo 1978.

> to be served, when—first and second degree murder, penalties for.—1. Persons convicted of the offense of capital murder shall, if the judge or jury so recommends after complying with the provisions of sections 565.006 and 565.012, be punished by death. If the judge or jury does not recommend the imposition of the death penalty on a finding of guilty of capital murder, the convicted person shall be punished by imprisonment by the division of corrections during his natural life and shall not be eligible for probation or parole until he has served a minimum of fifty years of his sentence.

One must carefully read the numerous provisions relating to the procedures and required findings provided in the cited statutes to fully appreciate the qualitative difference between our old capital-murder law and the present one. The differences are pointed up however by the case of State v. Tiedt, 229 S.W.2d 582 (Mo. banc 1950), a death-penalty case under our old law, when it is compared with the specific requirements of §§ 565.012.4 and 565.012.5, RSMo 1978.

In *Tiedt*, a jury found Tiedt guilty of "old" first-degree murder and assessed punishment at death. The only other penalty available was life imprisonment, § 559.030, *supra*, repealed. On appeal the defendant contended the trial court erred in refusing a certain instruction he tendered which would have told the jury that "'. . . the law relative to the right to receive the benefit of the doubt as to the severity of punishment'; that, if defendant was guilty of murder in the first degree, 'he was entitled to the benefit of a reasonable doubt * * * as to whether he should be given the death penalty or given a life sentence'; and that the 'same benefit of reasonable doubt should apply in fixing punishment as well as in determining whether any punishment should be assessed.'" *Id.* 585-6.

This Court held at 586: "The instruction was properly refused. If, under the evidence and instructions of the

court, the jury found defendant guilty of murder in the first degree, it was for the jury to fix the punishment. *The matter of punishment, within the limits fixed by the statute, was solely within the discretion of the jury under all of the facts and circumstances in evidence.* Secs. 4378, 4092, R.S. 1939, Mo.R.S.A.; State v. Bevins, 328 Mo. 1046, 43 S.W.2d 432, 434; State v. Creighton, 330 Mo. 1176, 52 S.W.2d 556, 563; Ex parte Dusenberry, 97 Mo. 504, 11 S.W. 217. *No question of reasonable doubt was involved in the matter of assessing the punishment.* People v. Krauser, 315 Ill. 485, 146 N.E. 593, 605." (Emphasis added.)

The concept set forth in *Tiedt* that the death penalty could be validly imposed without any standards or directions was again approved in State v. Coleman, 460 S.W. 2d 719 (Mo. banc 1970). But it was precisely this "unbridled discretion" which caused the Supreme Court of the United States to declare this procedure unconstitutional in Furman v. Georgia, 408 U.S. 238 (1972). For a more detailed discussion of what was required by *Furman* and its progeny, see State v. Duren, 547 S.W.2d 476 (Mo. banc 1977), where this Court held unconstitutional a mandatory death penalty for capital murder.

The Missouri General Assembly subsequently adopted the present law. The essential and substantive difference is that, at least where the death penalty is a possibility, the jury first decides whether the defendant is guilty or not guilty of capital murder. Of course the state has the burden of proof and the defendant has the benefit of reasonable doubt. If the defendant is found guilty of capital murder, then the second stage of the trial takes place. Sec. 565.006, RSMo 1978. This is completely new in our criminal jurisprudence. Sections 565.012.4 and 565.012.5, RSMo 1978, require that before a death penalty can be assessed the jury must again be properly instructed, must find *beyond a reasonable doubt* that at least one of the statutory aggravating circumstances exist, and must designate its finding in writing.

As pointed out in the dissent of Seiler, J., the instructions make it clear that the law requires that aggravating circumstances must be based on evidence and *that the burden of proof is upon the state to prove the same beyond a reasonable doubt.* MAI-CR 2d 15.40 and MAI-CR 2d 15.42.

The law requires affirmative findings beyond a reasonable doubt stated in a special verdict from before a death penalty can be imposed by the jury. The death penalty cannot result from a negative finding. The effect of our capital-murder law is that capital murder, *without more*, is punishable by life imprisonment without parole for fifty years. Capital murder *plus* an additional verdict of aggravating circumstances authorizes but even then does not compel the death penalty.

In view of the manner in which the legislature has dealt with the punishment for capital murder, which requires a separate finding and verdict by the jury if the death penalty is to be imposed, and because this is a new and unique procedure, we ought not try to fit this into any traditional molds of lesser-included offenses or degrees of homicide. The legislature has already done that by making significant and substantive differences in the penalty section of the capital-murder statutes. They have treated the death penalty as a punishment which is unique unto itself and not comparable to any term of imprisonment.

Under our capital-murder statutes, the crime may be punished by death if, and only if, the state carries its burden of proving beyond a reasonable doubt an element which is not necessarily part of the definition of capital murder. The jury does not decide this additional element when determining whether the defendant is guilty of capital murder. That additional element is the presence of a "statutory aggravating circumstance" which the jury may consider only *after* it finds the defendant guilty of capital murder and then only in those cases where the death penalty is sought. Thus what we have in

Missouri is (1) capital murder punishable only by life imprisonment without parole for fifty years, and (2) capital murder plus at least one aggravating circumstance which may be but is not required to be punishable by death.

In this case the jury has already acquitted the defendant of whatever was necessary to impose the death sentence. This was done in a separate trial or hearing devoted only to that matter and in which the state had the burden of proof and the defendant had the benefit of reasonable doubt. Although it does not fit nicely into traditional concepts, it is clear that the jury has acquitted on the death penalty and the defendant is therefore not subject to retrial on that issue.

In short, the new capital-murder statutes allow a defendant to be placed in jeopardy of conviction of capital murder and then, *after* conviction, allow a defendant to be placed in additional and separate jeopardy of the death penalty. And this defendant, after being placed in such additional and separate jeopardy of being put to death, was acquitted of that death penalty.

I therefore dissent and would quash the preliminary rule in prohibition.

JOHN E. BADGETT
Chief Justice

This Opinion Is the Modified Dissenting Opinion
Filed on March 11, 1980

[SEAL]

SUPREME COURT OF MISSOURI

EN BANC

No. 61499

STATE EX REL. GEORGE R. WESTFALL, RELATOR

v.

HON. DONALD L. MASON, Judge, 16th Judicial Circuit,
RESPONDENT

DISSENTING OPINION—Filed Mar. 11, 1980

I respectfully dissent. The case at bar presents a defendant who was convicted of capital murder in a bifurcated trial wherein the jury first decides his guilt and, after finding him guilty, in a second stage decides whether the death sentence will be imposed. In this second stage, pursuant to statute, the state presented evidence of aggravating circumstances and the defendant presented evidence of mitigating circumstances for the jury's consideration in determining whether to impose the death sentence. The jury determined a single issue, whether the facts marshalled by the state affirmatively justified the imposition of the death sentence on Robert Bullington.[1] The jury found against the state, deciding that

[1] The Missouri Approved Criminal Instruction submitted to the jury for this finding, MAI-CR 15.40 "Guilty of Capital Murder: Statutory Aggravating Circumstance—Finding Required for Death Penalty," with the two aggravating circumstances proffered by the prosecuting attorney would have read as follows:

[Footnote continued on p. 108]

none of the possibilities presented warranted the death sentence. The state now demands that it again be permitted to present the same facts to a second jury with the hope that the new jury will decide to execute the defendant. Three times during his oral argument before this court, the prosecuting attorney conceded that the state would offer the same evidence in support of its demand that Robert Bullington be sentenced to death.[2] The principal opinion will permit the state to relitigate a jury's determination that the death sentence is inappropriate whenever a defendant sentenced to life imprisonment succeeds in overturning an unconstitutional capital conviction.

The principal opinion does not distinguish the very different cases presented by single stage trials and the

---

[1] [Continued]

"In determining the punishment to be assessed (under Count ——) against the defendant for the murder of [*name of victim*], you must first unanimously determine

"Whether the defendant has a substantial history of serious assaultive convictions.

"Whether the murder of [*name of victim*] involved torture or depravity of mind and that as a result thereof it was outrageously or wantonly vile, horrible, or inhuman.

"You are further instructed that the burden rests upon the state to prove beyond a reasonable doubt at least one of the foregoing circumstances, and that it is an aggravating circumstance. The defendant is not required to prove or disprove anything.

"Therefore, if you do not unanimously find from the evidence beyond a reasonable doubt that at least one of the foregoing circumstances exists and that it is an aggravating circumstance, you must return a verdict fixing the punishment of the defendant at imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence."

[2] The statement in the principal opinion that it is speculative as to what the state's evidence on aggravation will be on retrial is contradicted by the statements of the prosecuting attorney who will again try the case for the state. There is no reason why we should doubt the prosecutor's knowledge of his case.

bifurcated trial required for the imposition of the death penalty. By not distinguishing the cases, the analysis overlooks the unanimous authority denying the state a second jury determination as to the death penalty once a jury singularly and affirmatively finds that the defendant is not to be put to death. The cases cited as authority in the principal opinion go back more than fifty years, long prior to establishment of present day standards and requirements which make a death penalty case unique. There has never been anything like it before. The cases relied on by the principal opinion all involve single stage proceedings and do not encompass or address in any respect the issues and complexity presented by the two separate trial stages required by the more recent United States Supreme Court cases for conviction *and* sentencing of the capital murder offense. The only cases directly in point, not all of which are discussed by the principal opinion, reach an opposite result.

I

In 1976, the United States Supreme Court upheld the constitutionality of Georgia's bifurated trial procedure for capital offenses in Gregg v. Georgia, 428 U.S. 153 (1976). In a companion case, Woodson v. North Carolina, 428 U.S. 280 (1976), the Supreme Court held unconstitutional North Carolina's mandatory death penalty statute for first-degree murder. In *Woodson*, the plurality opinion stated that the Constitution requires "particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." 428 U.S. at 303.

In 1977, the Missouri legislature enacted a bifurcated trial procedure for capital offenses, now §§ 565.008 and 565.012, RSMo 1978, patterned on the Georgia statute upheld in *Gregg*. The Georgia statute, Ga. Code §§ 27-2503 and 27-2534.1 (1975), provides for a trial in two

stages, one for a determination of guilt, and a second for a determination as to whether the degree of the convicted defendant's guilt justifies his execution. Under both statutes, a jury that convicts a defendant of capital murder in the first stage must then in the second stage hear new evidence and determine whether the defendant's guilt will be punished by a life sentence or whether his guilt is such that he should be put to death.

In the instant case, the principal opinion apparently finds that this determination by the jury in the second stage of trial is merely assigning punishment within the range provided by statute and not a finding of what is required to justify the death penalty. But in *Woodson*, the Supreme Court rejected this view: "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. *Death, in its finality, differs more from life imprisonment than a 100 year prison term differs from one of only a year or two.*" 428 U.S. at 305 (emphasis added).

The principal opinion makes much of the fact that there is but one crime of capital murder and refuses to acknowledge that the statutory framework treats capital murder markedly different than any other crime. It is true that § 565.001, RSMo 1978, defines capital murder. But taken alone it is incomplete. Without a penalty being prescribed, it is no more than an abstract declaration of law. A killing may be unlawful, willful, knowing, deliberate and premeditated, yet that is not all capital murder encompasses. In addition to guilt, there must also be found by the jury, beyond a reasonable doubt, aggravating circumstances which the jury must designate in writing in its verdict. Capital murder is meaningless without the punishment. There is no such thing as a conviction of capital murder per se without more. It has to be either capital murder with death or capital murder with life imprisonment, without probation for fifty years, etc. This does not "rend" the crime of capi-

tal murder. Rather, it recognizes what we all know to be the fact.

The statutes dealing with the crime provide for a unique two stage proceeding and require that the jury must affirmatively find beyond a reasonable doubt additional aggravating circumstances before it can impose the death penalty. By requiring that the additional element of aggravating circumstances be proven beyond a reasonable doubt for the imposition of the death penalty, the statutory framework effectively establishes the crime of aggravated capital murder punishable by death and the crime of capital murder punishable by life imprisonment without the possibility of probation or parole for fifty years. The legislature had no choice but to enact two degrees of punishment for the crime of capital murder. Had the legislature separated the degrees into two separate offenses, with one of a higher degree punishable only by death, the statute would have been unconstitutional under *Woodson* as a mandatory death penalty statute.

Accordingly, this case presents much more than the potential for enhanced punishment upon retrial under a single-verdict procedure. The issue in this case is whether, under the bifurcated trial procedure for capital cases, the state can ignore the jury's implicit acquittal of the defendant of what is required to justify imposition of the death penalty and on retrial once again ask a jury to find what it considered and declined to find in the first trial.[3]

---

[3] Exen a cursory glance at the Missouri Approved Criminal Instructions for the second stage in capital murder trials, after a jury has already convicted the defendant, indicates that a jury determination to impose a life sentence is an implied acquittal of the aggravated capital murder which would justify the imposition of the death penalty. The "Supplemental Notes on Use Applicable to the 15.00 Series of MAI-CR" (for homicides committed after May 25, 1977) requires the reading of: MAI-CR 15.30, 15.32 and 15.34 in the opening of the second stage before the presentation

The principal opinion would smudge the question of what issue the jury decided in the first trial when it gave defendant life imprisonment instead of death. The principal opinion speculates that perhaps the jury "intuitively" found the mitigating circumstances outweighed the aggravating circumstances or that perhaps the jury's "predilections as to mercy" explain the verdict or that perhaps it was in response to "a defendant's plea for mercy rather than finding no aggravation." There is no way we can know what may have subjectively impelled the jury to reject death and agree on life imprisonment. What we do know is that the jury has resolved the issue under instructions which, as pointed out below, presented it with a single, narrow issue for decision. The only "single rationally conceivable issue in dispute before the jury", Ashe v. Swenson, 397 U.S. 436, 445 (1969), after guilt was decided, was whether this defendant was to receive death or life imprisonment under the terms and conditions of the instructions given.

MAI-CR 15.30 instructs the jury that "at this stage of the trial it will be your duty to determine within the limits prescribed by law the punishment which must be imposed for the offense."

MAI-CR 15.32 instructs the jury it is to go to the jury room, "deliberate and arrive at your verdict fixing the punishment to be imposed upon the defendant."

MAI-CR 15.36 instructs the jury "it is your duty and yours alone to decide upon the punishment to be imposed upon the defendant . . ."

MAI-CR 15.40 concludes by instructing the jury, "Therefore, if you do not unanimously find from the evidence beyond a reasonable doubt that the foregoing circumstance exists and that it is an aggravating circum-

---

of evidence; MAI-CR 15.36 after the presentation of evidence and before argument; and MAI-CR 15.38, 15.40, 15.42, 15.44, 15.46 and 15.48 after argument. Finally, a special verdict form, MAI-CR 15.56.2, is presented to the jury for its determination of the question.

stance,[4] you must return a verdict fixing the punishment of the defendant at imprisonment for life . . ."

The same is true with respect to MAI-CR 15.42, which requires a verdict of life imprisonment if the jury does not find the aggravating circumstances are sufficient to warrant death.

MAI-CR 15.44 requires the jury to return a verdict of life imprisonment if the mitigating circumstances outweigh the aggravating circumstances.

Finally, MAI-CR 15.46 tells the jury that even if the mitigating circumstances do not outweigh the aggravating circumstances, the jury is not compelled to arrive at a death verdict.

Therefore, the verdict of life imprisonment in the first trial had to mean one of four things:

1. The jury did not find aggravating circumstances, or
2. It did not find the aggravating circumstances were sufficient to warrant death, or
3. The mitigating circumstances outweighed the aggravating circumstances, or
4. Even if they did not, the aggravating circumstances were not sufficient.

To use the language of *Ashe, supra*, this jury, under the instructions, could not have grounded its verdict as to life or death upon an issue other than that which the defendant seeks to foreclose from consideration—namely, that under the facts presented by the state, which the prosecution says will be the same on retrial, none of the possibilities warranting the death sentence existed.

This case raises squarely the issues of the rule of collateral estoppel embodied in the fifth amendment guarantee against double jeopardy as enunciated in Ashe v. Swenson, *supra*. In *Ashe*, the Supreme Court held that

---

[4] The instruction can be reworded slightly to cover the situation where there are several aggravating circumstances submitted, at least one of which must be found.

the applicability of the rule in criminal cases " 'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.' " 397 U.S. at 444 (citing Sealfron v. United States, 332 U.S. 575, 579). Viewed with an eye to all the circumstances of the proceedings, the case at bar presents a prior jury determination of "the single rationally conceivable issue in dispute", whether the defendant's guilt was such as to justify the death penalty. *See Ashe, Id.* at 445. Because the jury in the second stage of the trial found that the aggravating circumstances were either not present or were insufficient, the state should not be given a second chance to present the question to another jury.

II

Three state supreme courts have addressed the precise issue before this court, each of which held impermissible the state's attempt to relitigate at a second trial whether the convicted defendant's guilt justified the death penalty after the first jury decided the death penalty was not justified. Ward v. State, 239 Ga. 205, 236 S.E.2d 365 (1977); Commonwealth v. Littlejohn, 433 Pa. 336, 250 A.2d 811 (1969); People v. Henderson, 60 Cal. 2d 482, 386 P.2d 677, 35 Cal. Rptr. 77 (1963).

In Ward v. State, *supra*, the Georgia Supreme Court found the imposition of the death penalty in the second trial unlawfully disproportionate to the life sentence imposed by the first jury. The court found the disparity in sentences impermissibly disproportionate under Ga. Code § 27-2537(c)(3)(1975), which is word for word the same language contained in Missouri's statute providing standards for review of death penalty cases, § 565.014.3(3), RSMo 1978, as well as under the United States Supreme Court's standards in Gregg v. Georgia, *supra*.[5] The Georgia court concluded:

---

[5] In Gregg v. Georgia, 428 U.S. 153, 187 (1976), the Supreme Court held, among other things, that the imposition of the death

"The same defendant was tried previously on the same charges and the jury imposed a life sentence. Therefore the death sentence in the case under review is obviously disproportionate to the life sentence previously imposed against the same defendant in the same case. Accordingly, the law requires us to vacate the death sentence and direct the imposition of a life sentence. . . . To do otherwise would be incongruous and contrary to the clear mandate of the law. For as was said by the United States Supreme Court in Gregg, '[t]he provision for appellate review in the Georgia capital-sentencing system serves as a check against the random or arbitrary imposition of the death penalty. In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by action of an aberrant jury.' *Gregg*, supra, 428 U.S. at 206, 96 S.Ct. at 2940."

236 S.E.2d at 368. Because the Georgia and Missouri statutes providing standards for review of death penalty cases are almost identical, this case is certainly persuasive authority for denying the state on retrial a second chance to litigate its demand that the defendant be put to death once the first jury decides the issue against the state.

In the case at bar, the principal opinion attempts to distinguish the *Ward* case "in that the evidence had been presented at the subsequent proceeding and that evidence 'was essentially the same' as that presented at the first trial where the jury did not recommend a sentence of death." But as noted above, the prosecuting attorney in this case conceded during oral argument that the state's evidence in a second trial would be the same as that presented at the first trial. The principal opinion also says that the fact the "notice" required by

---

penalty cannot be disproportionate in relation to the crime for which it is imposed.

§ 565.006-2 as given in the instant case contains the same general averments of aggravation as the earlier notice should not be held to foreclose additional proof within the scope of the notice. But that is not defendant's contention. The prosecuting attorney, himself, has told us that the state's evidence in the second trial will be the same as that presented at the first trial. It is not a matter of what the scope of the notice allows. The fact is that the prosecutor, who is in a better position to know than we are, has conceded the evidence will be the same. This makes the cases virtually identical and the result reached in *Ward* all the more persuasive.

In Commonwealth v. Littlejohn, *supra*, the Pennsylvania Supreme Court held that the constitutional provisions relating to due process, equal protection and double jeopardy precluded the Commonwealth from seeking the death penalty in a second bifurcated trial against a defendant sentenced to life imprisonment in the first trial. The court found that exposing a defendant who appeals from a life sentence to a second possibility of receiving the death sentence at a new trial violates due process by conditioning the right of appeal.

> "The prisoner must decide whether to abandon his constitutional right to a fair trial and serve out his prison term under an invalid or unchallenged sentence, or exercise his statutory right to appeal in order to achieve his constitutional right to a fair trial, at the risk that his second trial might result in the imposition of the death penalty. This makes the price of appeal from an erroneous judgment in a first degree murder case the risk of a man's life. . . ."

250 A.2d at 813-14. The court found that "this choice not only shocks the conscience and offends our sense of justice, but also rises to an unconstitutional condition"

under United States v. Jackson, 390 U.S. 570 (1968).[6] *Id.* at 814.

The Pennsylvania court also found a violation of equal protection on the ground that of all defendants sentenced to life imprisonment, only those who appealed their sentences would be singled out for the possible imposition of the death penalty:

> "It is our view that the equal protection clause of the fourteenth amendment also prohibits the Commonwealth from imposing the threat of the death penalty on those who have been convicted of first degree murder and sentenced to life imprisonment. . . . [I]nstead of choosing a group for sentence review on the basis of some factor which bears a rational connection with the purpose of review, this system employs a completely irrational standard for choosing those whose sentences may be changed.
>
> "Further, . . . if the Commonwealth's purpose is to eliminate frivolous appeals, employing the deterrent of an increased sentence does not represent a rational standard. . . . The device of the threat of the death penalty does not bear *any* reasonable relation to the frivolousness or merits of the appeal."

250 A.2d at 815.

In *Littlejohn*, the Pennsylvania court also found a violation of the double jeopardy clause under the principle enunciated in Green v. United States, 355 U.S. 184 (1957). In *Green*, the United States Supreme Court held that a defendant, who had been convicted of second degree murder and successfully had that conviction reversed, could not be tried again for first degree murder.

---

[6] In United States v. Jackson, 390 U.S. 570 (1968), the Supreme Court held invalid as an unconstitutional condition a provision in the Federal Kidnapping Act, 18 U.S.C. § 1201(a), which provided that a defendant who chose to be tried by a jury was subject to the death penalty, but a defendant who waived his right to a jury trial gained immunity from the death sentence.

The court reasoned that the first jury, by returning a verdict of second degree murder, had impliedly acquitted the defendant of the first degree charge. In applying *Green* to the bifurcated trial and circumstances presented in *Littlejohn* (the circumstances presented this court in the case at bar), the Pennsylvania Supreme Court held that the double jeopardy clause prevented a prosecution for the higher punishment, namely, death rather than imprisonment, once the defendant has been convicted of and received the less severe punishment. *Id.* at 816.

In People v. Henderson, *supra*, the California Supreme Court held that in a bifurcated trial the prohibition against double jeopardy precluded the imposition of a death sentence upon a defendant after the reversal of the first judgment sentencing him to life imprisonment. Mr. Justice Traynor, writing for the court, reasoned that since Green v. United States, *supra*, established that a reversed conviction of a lesser degree of a crime precludes conviction of a higher degree on retrial, "[i]t is immaterial to the basic purpose of the constitutional provision against double jeopardy whether the legislature divides a crime into different punishments or allows the court or jury to fix different punishments for the same crime." 386 P.2d at 686. The California court also found that the death penalty threat imposed unreasonable conditions on the right to appeal:

> "A defendant's right to appeal from an erroneous judgment is unreasonably impaired when he is required to risk his life to invoke that right. Since the state has no interest in preserving erroneous judgments, it has no interest in foreclosing appeals therefrom by imposing unreasonable conditions on the right to appeal."

Id.

The principal opinion does not discuss the *Littlejohn* and *Henderson* cases.

In the case at bar, the principal opinion relies on Gully v. Kunzman, 592 F.2d 283 (6th Cir.) *cert. denied*, 99 S.Ct. 2850 (1979) as authority for its statement that the fifth amendment does not forbid imposition of the death penalty on retrial of defendant for an offense upon which he was originally sentenced to life. But the *Gully* decision did *not* involve a bifurcated trial with a second stage for determining whether the degree of guilt justified the death penalty:

> "The new death penalty statute was not employed at petitioner's first trial. Indeed, *the option of sentencing petitioners to death was not even submitted to the sentencing authority at the trial.* Accordingly, the fact that petitioners received only a life sentence after the first trial cannot be interpreted as 'an implicit acquittal' of the 'greater' offense created by the new death penalty law. *See* Green v. United States, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957)."

592 F.2d at 289 (emphasis added). Because *Gully* did not involve a specific jury finding that the defendant's degree of guilt did not justify the imposition of the death penalty, the *Gully* case is clearly distinguishable.[7] In

---

[7] For the same reason, the principal opinion places undue reliance on Stroud v. United States, 251 U.S. 15 (1919) and Chaffin v. Stynchcombe, 412 U.S. 17 (1973) (a robbery conviction that did not involve the imposition of the death penalty, both cases involving only single stage trials).

The principal opinion contends that *Chaffin*, despite the fact it involved only a single stage trial, nevertheless supports the proposition that the state may again seek the death penalty when defendant is tried before the second jury in the case before us, pointing out that *Chaffin* said that "bifurcation alone would not wipe away the fundamental differences between jury and judicial sentencing."

There was no bificurated trial in *Chaffin* and the *Chaffin* opinion does not purport to deal with the problems which are raised by the instant case, tried as it was under our system of instructions which focus the jury upon a single issue in the second stage proceedings, as discussed earlier herein.

fact, the *Gully* case actually supports the view that, in a bifurcated trial, the imposition of a life sentence by the jury in the second stage is for the purposes of double jeopardy analysis an implied acquittal of aggravated capital murder punishable by death:

> "We do not think this analysis far-fetched, since, under the new scheme, a defendant convicted of a capital offense may not be sentenced to death except upon a finding, 'beyond a reasonable doubt,' of certain statutorily-prescribed 'aggravating factors.' These 'factors' might be conceived of as elements of the 'greater' crimes of 'capital murder/armed robbery' rather than simply as guides for the exercise of the sentencing authority's discretion to fix an approximate punishment for one convicted of 'simple' willful murder and armed robbery."

Id. In any event, *Gully* is not authority for permitting the state to expose the defendant to the risk of the death penalty after a jury has implicitly acquitted him of guilt justifying the imposition of the death sentence.

As the review of the *Ward*, *Littlejohn*, *Henderson* and *Gully* cases indicates, the case at bar presents questions of due process, equal protection, and double jeopardy. I am convinced that the second exposure of this defendant to the potential of the imposition of the death penalty, after a jury in the second stage of a bifurcated trial singularly and affirmatively decided that the defendant is not to be put to death, would violate the fifth and fourteenth amendments of the United States Constitution, the due process clause of the Missouri Constitution, art. I, § 10, and § 565.014.3(3), RSMo 1978.

III

The result reached in the principal opinion infringes upon both the right to appeal and the right to a jury trial. Moreover, this result is fundamentally unfair where, as here, the necessity of the second trial is caused by the state's errors.

A

The Bill of Rights portion of the Missouri Constitution provides in art. I, § 14 "That the courts of justice shall be open to every person, and certain remedy afforded for every injury to person. . ." This section has been interpreted by this court "to protect citizens in enforcing rights recognized by law, without discrimination." Schulte v. Missionaries of LaSalette Corporation, 352 S.W.2d 636, 641 (Mo. 1961). In the case at bar, the defendant was originally convicted unconstitutionally that and he succeeded in overturning his conviction. His right to a fair trial had been denied him. The principal opinion effectively holds that this defendant, and others similarly spared the death sentence by a jury in the second stage of a capital trial, must forfeit the jury's implied acquittal of the death penalty in order to challenge an unconstitutional conviction. This result obviously discriminates against persons who attempt to enforce their rights to be free from unconstitutional convictions. This discrimination and infringement upon the right of appeal, by forcing a person unconstitutionally convicted to risk the imposition of the death sentence in order to vindicate his rights, violates Mo. Const. art. I, § 14.

B

Aside from infringing the right of appeal, the result reached under the principal opinion will chill the exercise of defendant's right to a jury determination in the second stage of trial. This result will arise when the defendant is forced to choose whether he will exercise his right to a jury trial or settle for sentencing by the trial judge to avoid the possible imposition of the death penalty upon retrial.

In North Carolina v. Pearce, 395 U.S. 711 (1969), the United States Supreme Court held that when a defendant has succeeded in obtaining a new trial, the due process clause prevents a sentencing judge from imposing a

harsher sentence on the defendant if he is convicted in the second trial, absent any identifiable misconduct by the defendant between the time of the first and second trial. The Supreme Court held:

> "Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.
>
> "In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal."

395 U.S. at 725-26.

The general sentencing provisions of the new criminal code permit a defendant to request "in writing that the court assess punishment in case of a finding of guilt" by the jury. § 557.036.2, RSMo 1978. If the defendant waives jury sentencing and, therefore, is sentenced instead by the judge in the event of a finding of guilt, the judge will be bound by the holding of *North Carolina* v. *Pearce, supra.* Accordingly, a defendant given life imprisonment by the jury after a capital conviction may, if he succeeds in obtaining a new trial, limit the maxi-

mum sentence in the second trial to life imprisonment by waiving jury sentencing in the second trial.[8]

As a result of the holding in the principal opinion, a defendant who obtains a new trial after being sentenced to life imprisonment in a bifurcated capital murder trial will be forced, in the second trial, to waive his right to jury trial guaranteed under the sixth amendment, Duncan v. Louisiana, 391 U.S. 145 (1968), the Missouri Constitution, art. I, § 22(a), to avoid putting his life in jeopardy once again. Only if the defendant waives his right to a jury determination in the second stage of trial can he avoid being forced to run the gauntlet until the state succeeds in its efforts to take his life. Consequently, the result reached today erects the same framework impairing the right to a jury trial which was held unconstitutional in United States v. Jackson, *supra.*

In *Jackson,* the United States Supreme Court held unconstitutional the provision in the Federal Kidnapping Act, 18 U.S.C. § 1201(a), which provided that a defendant who chose to be tried by jury was subject to the death penalty, but a defendant who waived his right to a jury trial gained immunity from the death penalty. Like the defendant in *Jackson,* the defendant in the case at bar is subject to the death penalty if he chooses to be tried by jury in the second stage of trial, but gains immunity from the death penalty if he waives his right to jury sentencing. As in the unconstitutional framework in *Jackson,* under today's decision the defendant, if "ingenuous enough to seek a jury acquittal stands forewarned that, if the jury finds him guilty and does not wish to spare his life, he will die." 390 U.S. at 581. But the Supreme Court found this result "needlessly chill[s] the exercise of basic constitutional rights." *Id.* at 582.

---

[8] This strategy forces the defendant to run the risk, however, that if the jury in the second trial finds the defendant guilty of a non-capital offense, the jury may impose a harsher sentence than the jury would have imposed on him.

C

There is another consideration, too. It is basically unfair to permit the state, after it has failed to obtain a death sentence, and after a new trial has been awarded because of the state's errors, to keep trying the defendant over and over for the death penalty. Even where his life is at stake, the defendant cannot match the resources of the state and sooner or later the state will prevail.

IV

The principal opinion contends that if the first jury's decision on punishment binds any later jury, "the argument could be made that if the first jury decided on death as an appropriate sentence the second jury's consideration would be limited to only that punishment." While there may be surface appeal in this proposition, the argument ignores long-standing constitutional principles. In United States v. Ball, 163 U.S. 662, 671 (1896), the United States Supreme Court unequivocally stated that a "verdict of acquittal was final, and could not be reviewed, on error or otherwise, without putting [the defendant] twice in jeopardy, and thereby violating the Constitution." And in Green v. United States, *supra*, the Supreme Court made clear that an implied verdict of acquittal of a greater offense, as when the jury convicts the defendant of a lesser offense, enjoys the same finality and insulation from review as an outright acquittal. In the case at bar, the court is presented with the jury's implied acquittal of capital murder with the death penalty, as the jury refused to find in the second stage of trial that the state's proffered aggravating circumstances justified putting the defendant to death.

The Missouri capital murder statutes require that the jury pass on whether defendant is to be found guilty of capital murder with the death penalty or capital murder with life imprisonment without eligibility for probation or parole for fifty years. Once the issue is decided in the defendant's favor, whether by an outright acquittal

as in United States v. Ball, *supra*, or by an implied acquittal as in Green v. United States, *supra*, the dispute as to the question is ended "then and there." *See* United States v. Jorn, 400 U.S. 470, 484 (1971). "[T]here is no exception permitting retrial once the defendant has been acquitted, no matter how 'egregiously erroneous,' . . . the legal rulings leading to that judgment might be." Sanabria v. United States, 437 U.S. 54, 75 (1978). In *Green*, the Supreme Court flatly rejected the government's contention that the defendant "must be willing to barter his constitutional protection against a second prosecution for an offense punishable by death as the price of a successful appeal from an erroneous conviction of another offense for which he has been sentenced . . ." 355 U.S. at 193-94.

In any event, it would not be sound for the court to decide the actual issues presented in this case on the basis of speculation as to the result we would reach in a hypothetical case. The principal opinion has postulated a nonexistent contingency—that of a case where defendant was given death—different from the facts before us, the legal questions of which nonexistent case have neither been briefed nor argued. If this anticipated issue were to arise, this court may decide the case after the issue is timely briefed and argued. I would decide the question when it arises; it is not an issue in this case.

V

Although the principal opinion states at the outset that the "principal question for our determination is whether on retrial the death penalty . . . is barred as possible punishment by constitutional or statutory consideration" [9] and concludes that the trial court would be exceeding its

[9] It is important to bear in mind that the constitutional issue referred to is not the constitutionality of the death penalty, but whether it is constitutional to subject defendant to the death penalty on retrial after the jury in the first trial had rejected the death penalty and given the defendant life imprisonment.

authority in denying the state leave to seek imposition of the death penalty on retrial and hence prohibition lies, the opinion also addresses the constitutionality of the death penalty. That point is not raised in relator's original brief in any way. Counsel for respondent in his brief predicts that the death penalty will in due course be held unconstitutional, but that they will "say no more here than enough to make the point, in order to preserve it for appeal" (obviously referring to the appeal which may come after the retrial of the capital murder case), and then argues that § 565.012.2(7), RSMo 1978, one of the statutory aggravating circumstances proffered by the state in its effort to impose the death penalty on defendant, is unduly broad and vague. Relator, then, in his reply brief "suggests that the instant proceeding is not the proper time to consider this particular issue. Whether the statute is overly broad can be better determined when the Court has a case on appeal with a full transcript of the proceedings to assist it." Neither side purports to have briefed or argued these last two constitutional questions thoroughly or adequately.

The present action is in prohibition and once the question of whether the trial judge will exceed his jurisdiction if he goes through with his intention to sustain defendant's motion to strike is determined, the prohibition action is settled. Clearly respondent is not contemplating making that order for the reason he considers the death penalty unconstitutional, because he permitted the death penalty issue to be tried in the first trial. Respondent is contemplating making the order for the reason that defendant was subjected to the death penalty in the first trial, but the jury rejected it, and hence defendant cannot be subjected to it again in the second trial, respondent believes. To go further and reach out to decide the constitutionality of the death penalty under art. I, § 21 of the Missouri Constitution is to violate our long established rule that we abstain from passing on constitutional questions which are unnecessary to a disposition of the

case. See the many cases so holding collected in 7 West's Missouri Digest, *Constitutional* Law, Key No. 46 (1).

I would await a case where the death penalty is squarely before us on direct appeal, with adequate briefing and argument, to pass on its constitutionality. We should not casually foreclose a question of this magnitude.

Additionally, the questions of whether the statutory aggravating circumstances are unconstitutional as unduly broad and vague, and whether the death penalty would be unconstitutional as cruel and unusual punishment if applied to this defendant are questions not ripe for adjudication, as this defendant has yet to stand trial, and we do not know what the outcome of the second trial may be. Defendant may not receive the death penalty in a second trial, even if the present case goes against him, nor do we know what evidence defendant may offer as to the cruel and unusual aspects of the death penalty. These are all questions properly addressed on appeal. "[P]rohibition cannot be substituted for an appeal." State ex rel. Vogel v. Campbell, 505 S.W.2d 54, 58 (Mo. banc 1974). I would quash the preliminary rule.

ROBERT E. SEILER
Judge

SUPREME COURT OF THE UNITED STATES

No. 79-6740

ROBERT BULLINGTON, PETITIONER

v.

MISSOURI

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

October 6, 1980

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 333111 147